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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TCI CABLEVISION, INC., COMMUNITY TELE-COMMUNICATIONS, INC., and TELE-COMMUNICATIONS, INC.,
Petitioners,

—against—

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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39 pp

QUESTIONS PRESENTED

1. Does the First Amendment prohibit a court from holding, solely on the basis of a finding that the local cable television market is a "natural monopoly", that a municipality may curtail a cable television publisher's right to continue to publish and may appoint another cable television system as the exclusive cable publisher for the municipality?

2. Were Petitioners improperly denied independent appellate review of the record in view of the First Amendment rights at issue?

3. If exclusive licensing of cable speech is constitutional, were Petitioners' attempts to persuade a local legislative body to renew their cable television license, even if done with intent to achieve an exclusive franchise, protected by the *Noerr-Pennington* doctrine?

4. Did the court of appeals err in permitting the jury to find a fact by inferring causation from circumstances that had not been proved, but rather were themselves inferred?[1]

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[1] We ask the Court to consider this question only in the event the Court grants the writ as to the third question presented.

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF THE PETITIONERS

The list of parent companies, subsidiaries and affiliates of the petitioners is printed in the Appendix at pages 126a-39a.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners TCI Cablevision, Inc., Community Tele-Communications, Inc. and Tele-Communications, Inc. ("TCI") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on August 26, 1986.

OPINIONS BELOW

The decision of the Eighth Circuit sought to be reviewed is reported at 800 F.2d 711, and is printed in the Appendix at pages 1a-37a (cited hereafter as "App. ").

The opinion of the district court denying TCI's motion for judgment n.o.v., for a new trial and for a stay of execution is reported at 610 F. Supp. 891, and is printed in the Appendix at pages 38a-71a.

The opinion of the district court denying TCI's motion to dismiss the antitrust claims but granting its motion to dismiss claims brought under 42 U.S.C. § 1985(3) is reported at 589 F. Supp. 85, and is printed in the Appendix at pages 72a-81a.

JURISDICTION

The district court entered judgment on January 25, 1985, which is printed in the Appendix at page 84a. TCI timely filed motions for judgment notwithstanding the verdict or for a new trial on February 1, 1985. The district court entered amended judgments on May 29, 1985, and June 5, 1985, which are printed in the Appendix at pages 85a and 87a, and denied TCI's post-trial motions by order entered June 5, 1985, which is printed in the Appendix at page 86a.

The judgment of the Court of Appeals was entered on

August 26, 1986, and is printed in the Appendix at page 82a. TCI timely filed a petition for rehearing and suggestions for rehearing en banc on September 19, 1986. The petition was denied by order entered October 16, 1986, which is printed in the Appendix at page 83a.

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved in this case is the First Amendment. The statutory provisions involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15. The text of those constitutional and statutory provisions are printed in the Appendix at pages 99a-101a.

STATEMENT OF THE CASE

This case arises from a heated political contest over the right of a cable television publisher to continue to publish in Jefferson City, Missouri (the "City"), and presents profound questions involving government interference with First Amendment rights and the scope and application of the *Noerr-Pennington* doctrine.

TCI owned and operated a cable television plant in Jefferson City providing cable television service to that City for a number of years prior to the events here involved. Pursuant to municipal policy, TCI was required to renew its nonexclusive cable television license. TCI sought to persuade voters and municipal officials that its license should be renewed.

Respondent Central was founded, with a capitalization of approximately $59,000, for purposes of obtaining an exclusive franchise at the expense of TCI's right to continue to publish.[2] Central sought to persuade municipal officials that, notwithstanding TCI's First Amendment right of equal access to

[2] The ultimate equity available to be invested in Central was between $316,000 and $540,000.

communicate via cable, it should be permitted to replace TCI. Central maintained throughout that it could not and would not perform under any franchise unless TCI and every other applicant were excluded. Eventually, TCI was able to renew its license. Central did not seek a concurrent nonexclusive license. Instead, Central sued TCI and the City, alleging, among other things, the denial of its First Amendment rights as a cable television publisher. (App. 95a-98a)

Central contended that TCI had coerced the City to grant it a franchise by a series of exclusionary acts, which Central claimed subverted the selection process engaged in by the City (over TCI's objections). After a 31 day trial (and 2 hours, 46 minutes of deliberations), the jury found that TCI and one or more City officials had conspired to restrain competition in violation of §1 of the Sherman Act. It further found that TCI had monopolized the cable market in Jefferson City, and that TCI had tortiously interfered with an economic expectancy of Central in violation of state law. The jury awarded more than $35 million in damages to Central based upon the claimed value of Central's proposed system in the third year of operation under an *exclusive* franchise.

The Eighth Circuit Court of Appeals, in reviewing the verdict, relegated cable speech to the lower standard of First Amendment protection accorded to broadcasting publishers, despite the fact that two other circuits had already rejected such a standard as unsupportable in the cable television field—a rejection subsequently joined by the Federal Communications Commission. The court further held that a cable publisher's right to free speech may be curtailed solely on the basis of a purported "natural monopoly" in the market to be served, while refusing even to review independently the evidence on the issue of natural monopoly. The Court of Appeals for the District of Columbia has firmly rejected that result, and principles enunciated by this Court in other contexts make clear that the notion of "natural monopoly" may not be so lightly invoked to regulate speech. Resolution of this issue is critical to the development of cable technology in this country, and the Court should take the opportunity to resolve this conflict.

The court of appeals also narrowly circumscribed the scope of political conduct protected by the *Noerr-Pennington* doctrine. The court characterized TCI's conduct as a "sham", and upheld a jury finding that TCI's actions were not protected by the doctrine pursuant to an instruction that removed from *Noerr-Pennington* protection any conduct that included any form of "threats", "intimidation" or "coercion". This permitted the jury to punish TCI for aggressive lobbying of government officials that did not meet with the jury's approval. This decision is not only flatly inconsistent with this Court's prior holdings, it also pits the Eighth and Ninth Circuits' narrow view of *Noerr-Pennington* against the more expansive interpretations adopted by the Seventh and Tenth Circuits. The danger to the dynamics of our political system caused by too quickly categorizing unpopular lobbying as "sham" tactics should be readily apparent, and requires this Court to end the existing confusion over the scope and application of the *Noerr-Pennington* doctrine.

1. The 1980 Cable Television RFP

TCI, which had managed the system for the prior owner, purchased the system in 1978 with the consent of the City, and thereafter made both improvements and major capital additions to it. Yet, in December 1980, the City Council resolved to obtain "bids" for the *de facto* exclusive right to serve Jefferson City with cable television once TCI's license expired in April 1981. Prospective applicants, including Central and TCI, were sent copies of a Request for Proposals ("RFP").[3]

The RFP outlined a procedure for applying for "the franchise" and indicated that only one bidder would be given a franchise.[4] The RFP established guidelines regarding programming, required bidders to disclose their programming

[3] The RFP was not a true bidding or auction process because the "highest bidder" was not guaranteed the franchise. Rather, based on the proposals, the City would choose one company with which to negotiate the details of the ultimate license. Thus, the potential publisher was to be chosen by the City Council based on a standardless, subjective process.

[4] The City Attorney, Thomas Graham, later emphasized that no one would be allowed to operate a cable television business in the City after April 21, 1981, without a franchise obtained through the RFP process.

intentions and philosophy, and required that the City be given control of several channels. It also prohibited any advertising by applicants designed to influence the RFP process. It soon became clear that only Central and a company called Teltran wished to participate in the City's RFP process.

TCI believed it had a right, protected by the First Amendment, to remain in the market. Therefore, TCI's representatives attended a January 19, 1981 City Council meeting to explain that, while TCI would not object if other competitors entered the market, it was determined to exercise its right to remain in the market as well.

In March 1981, Central and Teltran responded to the RFP. TCI filed a proposal but made clear that it would not respond to the RFP as formulated.[5]

To confirm its constitutional right to remain in operation, TCI filed suit in federal court in the Western District of Missouri on March 16, 1981, seeking damages and an injunction to restrain the City from interfering with TCI's operations.[6] The case was assigned to Judge Scott O. Wright, who also presided over the trial of this action. During the litigation, TCI subpoenaed George K. Baum & Company, the company working with Central to obtain financing for the cable system, seeking documents relating to Central's proposed financing.

2. The Revised RFP

In June 1981, Thomas Utterback became City Counsellor, replacing the City Attorney. In October 1981, the City requested TCI, Central and Teltran to update their proposals. The City also stated that it would negotiate privately with each company. TCI took the position that any meetings with the City would be in the context of negotiating a settlement of its lawsuit. On October 28, 1981, Teltran withdrew its application.

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[5] TCI indicated that: "Many of the provisions of the above-described proposed ordinances call for a waiver by TCI . . . of Constitutional rights . . . . It is the view of the Company that it cannot be required to waive these rights as a condition to conducting a lawful cable television business . . . . Hence the limited nature of TCI's proposal."

[6] The relevant parts of that complaint are printed in the Appendix at pages 88a-93a. TCI did not seek relief that would exclude others from the marketplace.

A City Council subcommittee and the City Counsellor met separately with TCI and Central prior to making their report to the full Council on January 4, 1982. The subcommittee advised licensing only one cable company. It recommended that the City negotiate first with TCI, and then, if the negotiations failed, with Central.

On January 25, 1982, though the TCI suit against the City was pending, and despite the contrary recommendation from its own subcommittee, the Council voted to pursue negotiations only with Central. The Council's vote immediately spurred a vigorous public debate. A front-page editorial in a local newspaper criticized the Council for its tentative selection of Central to the exclusion of TCI and called upon citizens to make their displeasure known to Council members. In response, Central (at the insistence of a beleaguered Council) placed an advertisement defending the Council vote, and urging citizens to "[l]et the city council know that you resent the threats and intimidations that have been directed towards them".

TCI responded with public statements of its own.[7] As the public debate reached a crescendo, TCI stated publicly that in view of the City's policy requiring a franchise, if TCI's license were not renewed it would shut down its system at the expiration of its term, leaving Jefferson City residents able to view only a few broadcast television stations for six to twelve

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[7] For example, TCI placed an advertisement in the Jefferson City *News & Tribune* on February 7, 1982 that stated:

TCI SIMPLY WANTS TO COMPETE

. . . .

TCI has no objection if the City enters into contracts with competitors of TCI, but feels that it, too, has a right to do business in Jefferson City.

. . . .

If both companies are afforded an equal opportunity to do business, you the citizens can select the company with which you desire to do business, and which you believe furnishes a better service at better rates. TCI has competed successfully in other cities and is confident it can so compete here if it has the opportunity to do so.

months while Central attempted to construct its own cable system. This proved to be the turning point in the controversy.[8]

On February 10, 1982, Judge Wright, on the City's motion to dismiss, ruled that each count of TCI's complaint, including its First Amendment claims, stated a proper claim for relief. Subsequently, TCI withheld the annual license fee otherwise due to the City as a set-off against the damages it sought in its suit. By agreement with the City those funds were placed in an escrow account pending the outcome of TCI's suit.

3. The Renewal of TCI's License

The cable television issue was taken up again at the April 5, 1982 Council meeting. "[I]n order to answer public outcry as to why the Council has not given TCI a chance", the Council voted to negotiate with TCI and, if the negotiations failed, "then they have lost". The Council also passed the "regulatory ordinance" negotiated with Central—however, a bill actually awarding the franchise to Central was tabled.

From April 12 to 15, 1982, members of the City Council, Utterback and Mayor Hartsfield negotiated with representatives from TCI and its counsel of record in its suit against the City. On April 16, 1982, Mayor Hartsfield announced an agreement with TCI on a regulatory ordinance and settlement of the lawsuit against the City. Hartsfield later indicated he would veto any ordinance granting a franchise to Central *alone*.

At the April 20, 1982 Council meeting, notwithstanding the negotiations with TCI, one councilman reintroduced the bill granting the franchise to Central. The bill was passed by a vote of 7 to 3. Mayor Hartsfield vetoed the bill stating "[t]here exists no justification for this award at the exclusion of [TCI]". A veto override (requiring 7 votes) failed when three councilmen who had voted for the bill did not vote to override.

The TCI regulatory ordinance was then introduced and passed when the Mayor cast the tie-breaking vote. TCI was

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[8] Central characterized TCI's service interruption message as a threat in its closing argument and continued to make the point on appeal, contending that "the record establishes that Central's inability to guarantee uninterrupted cable service directly caused Central to lose the franchise".

voted (6-4) a seven-year franchise. TCI thereafter dismissed its action against the City and paid the 1981 franchise fee.

Mayor Hartsfield testified that he vetoed the franchise for Central because of political pressure from constituents who feared an interruption of service. Councilmen testified that they were deluged with citizen complaints who feared that if TCI's franchise were not renewed, their cable television service would be interrupted during the period required for installation of Central's equipment.

4. Proceedings Below

On February 22, 1983, Central sued TCI and the City. (The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1337, and 1343 and Sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15, 22; Central's claims asserted pursuant to the common law of Missouri were heard as pendent state claims.) Before trial, Central settled with the City.

At trial the jury returned verdicts for plaintiff and assessed compensatory antitrust damages of $10,800,000 and, on the state law claim, the same compensatory damages and $25 million in punitive damages. (App. 84a)

On June 5, 1985, the trial court denied TCI's motion for judgment notwithstanding the verdict. (App. 38a-71a)

TCI filed a timely appeal raising several issues, including those that are the subject of this Petition.

1. Central recovered for loss of its "right" to obtain an exclusive license to speak through the cable medium in Jefferson City—a property right that TCI claimed could not exist consistent with the First Amendment. The court of appeals held that an exclusive cable franchise was a constitutionally protectable interest. Acknowledging the "profound first amendment implications inherent in the regulation of cable operators" (App. 9a), and in the absence of any finding of physical inability to accommodate two cable systems, the court nevertheless endorsed the view that cable should be compared to the broadcast medium, in that a greater intrusion by government can be countenanced. (App. 5a-9a) From that

premise the court proceeded to find as a matter of law that the existence of a "natural monopoly", *i.e.*, economic conditions in which only one entrant may ultimately survive in the market, overcomes any First Amendment prohibition on exclusive licensing. The court's only explanation for such a finding was that the exclusive licensing process was the only way the City could "create competition *for* its cable television market". (App. 10a) (emphasis supplied) The court did not provide any analysis as to how economic scarcity could justify such suppression of speech by the City, or what public interests were served by limiting the number of cable publishers, or why competition *in* the market was not possible (other than Central's refusal to compete). It merely relied upon similar conclusory statements by the Courts of Appeals for the Seventh and Tenth Circuits (while giving scant regard to the opposing views of the Ninth and D.C. Circuits). Noting that Central's proposed system would be more up to date than TCI's existing system, and therefore "went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable", the court also concluded that TCI's asserted right to remain in service would not "enhance" First Amendment values. (App. 11a)[9]

2. Although TCI requested the court to review the record below on the First Amendment question under the standards required by this Court's decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), the court of appeals did not undertake an independent review, nor did it explain why it was refusing to do so. Instead, it merely accepted an implied finding by the jury of natural monopoly.

3. TCI maintained on appeal that even if its actions could be found to have an anti-competitive purpose and effect, the conduct challenged by Central was protected by the *Noerr-Pennington* doctrine and, therefore, could not result in liability

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[9] As an alternative holding, the court of appeals found that the evidence supported a finding by the jury that "TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly", and presumably thereby lost its right to assert any defense based on the First Amendment. (App. 4a, 11a)

under the Sherman Act or state tortious interference law.[10] The court of appeals held that TCI had an absolute right to turn off its system at the expiration of its license and to refuse to sell its system to Central. (App. 16a) Yet the court upheld a charge to the jury that declared lobbying that includes "threats", "intimidation" or "coercion" (App. 19a) to be outside the protection of the *Noerr-Pennington* doctrine (without any indication to the jury that the threat to discontinue service was protected conduct as a matter of law). The court found that TCI engaged in other "excessive and intimidating conduct", by which it "sought to distort the [RFP] process" in: (i) refusing to participate in the RFP; (ii) attempting to interfere with Central's financing; (iii) withholding a past due franchise fee; and (iv) coercing City officials into holding private negotiations in alleged violation of the RFP and Missouri sunshine laws. (App. 24a-25a) The court of appeals held that these actions, unlike the service termination threat, were beyond the scope of *Noerr-Pennington* protection.

REASONS FOR GRANTING THE WRIT

I. THE FIRST AMENDMENT—WHICH PRECLUDES EXCLUSIVE CABLE TELEVISION LICENSING BASED UPON ECONOMIC CONSIDERATIONS—RENDERS UNCONSTITUTIONAL THE INTEREST UPON WHICH CENTRAL RECOVERED.

Central recovered more than $35 million for loss of a purported interest to be the *only* cable speaker in Jefferson City. TCI maintains that the Constitution prevents this type of winner-take-all political licensing process for the right to expression through the cable medium, and thus Central had no legally protectable interest upon which to base its claims. The constitutional right to publish does not encompass the right to be the exclusive publisher.

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[10] The one area of conduct not protected under *Noerr-Pennington* involved alleged threats by a TCI employee to an independent consultant to the City and to executives of Teltran. The court of appeals held that the jury could have found that those threats had caused Central's loss of an exclusive license. That holding, however, ignored rulings of this Court on the use of circumstantial evidence, which precluded such a finding (*see* Section IV, *infra*).

This Court has held that cable speakers are entitled to First Amendment protection. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2037 (1986). The Court left for another day the balancing of "competing societal interests" against the First Amendment interests of cable speakers to determine the precise limits of that protection. *Id.* at 2038. This case affords the Court, on a record developed at trial, the opportunity to resolve a conflict among the courts of appeals as to whether a government's desire to address perceived natural monopoly conditions in a market can constitute a societal interest adequate to overcome a cable television publisher's First Amendment right to serve that market.

A. The Court of Appeals Erred in Reviewing TCI's First Amendment Defense by Applying to Cable Television Standards Applicable Only to Government Regulation of Broadcasting.

The Eighth Circuit posed the question of First Amendment protection for cable speech in black and white terms, as "whether cable television should be analyzed under the standards applicable to newspapers or those applicable to broadcasters". (App. 5a) Newspapers have been historically free of government regulation which might infringe upon their First Amendment rights,[11] whereas broadcasting entities are subject to some government regulation, including regulation of access to the market, due to the physical scarcity of the airwaves.[12] The Eighth Circuit, ostensibly following the lead of the Seventh and Tenth Circuits in *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), and *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982), found cable to be "more analogous" to broadcasting than newspaper publishing, and thus subject to the same intrusive degree of

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[11] *E.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974).

[12] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396-400 (1969); *see also FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

regulation.[13] The court's decision made no attempt to analyze whether there was any physical scarcity basis for regulation or whether less intrusive regulation might adhere to the new technology at issue.[14] The court erroneously assumed that if cable is not wholly analogous to newspapers, then the same less stringent standard of First Amendment review of government regulation applies as in the broadcasting field.

That ruling places the Eighth Circuit in disagreement with the District of Columbia and Ninth Circuits.[15] Those courts have refused to compare cable to broadcast television, because the rationale under which the broadcast medium is subject to more intrusive government regulation—the inability of the airwaves to accommodate all prospective users—has no application to cable. *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1444 n.22, 1448-50 (D.C. Cir. 1985) ("the standard of First Amendment review reserved for occupants of the physically

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[13] The Eighth Circuit earlier had observed that government "authority to intrude upon the First Amendment rights of cable operators . . . is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters." *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

[14] The poles in Jefferson City are owned by United Telephone Company. Under a so-called "strand agreement", TCI leases from the telephone company the use of a strand attached to those poles for coaxial cable support. There is no technical or legal reason why two or more cables cannot be lashed on a single strand, and the telephone company—not TCI—has complete control over decisions to lease the use of the strand to others or to provide a separate strand. Either option was available to Central.

[15] The Eighth Circuit is also in conflict with dicta of this Court in *Preferred*. While declining to set the precise limits of cable speakers' First Amendment protection on the record before it, 106 S. Ct. at 2038, the Court nonetheless likened cable television to print media, noting that cable "partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers and pamphleteers". *Id.* at 2037. Certainly the *Preferred* decision indicates that each technology must be analyzed separately and may fall somewhere between the ends of the spectrum, *i.e.*, between broadcasting and newspapers. Even *Omega Satellite*, on which the Eighth Circuit based its decision in part, recognized that the "physical scarcity" rationale has no place in cable analysis. 694 F.2d at 127.

scarce airwaves is plainly inapplicable" to cable), *cert. denied*, 106 S. Ct. 2889 (1986); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403-04 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986).[16]

Moreover, the Eighth Circuit's view has recently been implicitly criticized by the Federal Communications Commission itself, which noted "the unsettled nature of the law" regarding cable speakers' rights under the First Amendment, and concluded that "[w]e do not find that the rationales for applying [to cable] a lower First Amendment scrutiny standard analogous to that adopted for broadcasting . . . are persuasive or are sufficiently likely to prevail on review that regulation should be based thereon."[17]

There is thus a clear conflict among the Circuits as to the application of the broadcast standard of allowable government regulation to a cable speaker's First Amendment rights—a conflict that will continue to cause uncertainty and confusion for cities and cable speakers in litigation throughout the country.[18]

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[16] *See also Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 508 (D.C. Cir. 1986) (Bork, J.) ("Employing the scarcity concept as an analytic tool, particularly with respect to new and unforeseen technologies, inevitably leads to strained reasoning and artificial results.").

[17] Report and Order in the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, November 28, 1986, MM Dkt. No. 85-349 ("FCC Report and Order"), at ¶ 184. As noted in *Quincy*, the President's Cabinet Committee on Cable Communications and the Sloan Commission concluded that "the analogy [of cable] to more traditional media is compelling". 768 F.2d at 1450.

[18] *See, e.g., Century Federal, Inc. v. City of Palo Alto*, No. 85-2168, slip op. at 2, 20-23 (N.D. Cal. Dec. 3, 1986) (App. 102a-03a, 115a-18a), decided after the Eighth Circuit's decision in this case. The district court rejected the Eighth Circuit's analysis and held that "cable television is more closely analogous to newspapers than the broadcast media" and therefore cable speakers are entitled to the full protection of the First Amendment; *see also* FCC Report and Order at ¶ 184 (noting the "unsettled nature of the law in this area"). In addition to *Century Federal*, there are currently a number of cases pending that involve this issue. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986) (remanded); *Pacific West Cable Co. v. City of Sacramento*, 798 F.2d 353 (9th Cir. 1986);

By granting the Petition, the Court will be able—on an evidentiary record as to the nature of cable speech, technology and economics—to make clear to the lower courts that the relaxed standard of First Amendment review for broadcasting is not an appropriate standard by which to judge government regulation of cable television.

B. Under Any View of Cable Speakers' First Amendment Rights, "Natural Monopoly" Cannot Justify The Exclusive Licensing of Speech.

This Court has already flatly rejected the "natural monopoly" argument as justification for curtailment of First Amendment rights. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court held that the tendency of daily newspapers to occupy monopoly positions in their distribution areas could not justify a statute obligating newspapers to provide space to potential candidates for office criticized by the papers. That holding was not based upon any peculiarities of the newspaper publishing business, but upon fundamental First Amendment principles. The D.C. Circuit recently held that there is no meaningful distinction between cable television and newspapers on the issue of economic scarcity, *Quincy*, 768 F.2d at 1450, while the Ninth Circuit has indicated it will rule the same way. *See Preferred*, 754 F.2d at 1404-05; *see also Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055-56 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979). The Court can now take the opportunity to make clear that, whatever the precise level of First Amendment protection ultimately accorded cable tele-

Nor-West Comm. v. City of St. Paul, 802 F.2d 462 (8th Cir. 1986) (remanded); *Best View Cablevision, Inc. v. City of Abbeville*, No. 85-1159 (4th Cir. Aug. 13, 1986) (remanded); *Nation Wide Cablevision, Inc. v. United States*, C 86-1751 (W.D. Wash. filed Oct. 29, 1986); *City of El Segundo v. Group W Cable, Inc.*, No. CV 86-5029 DT (C.D. Cal. *removed from* Cal. Super. Ct. Aug. 1, 1986); *Madison Cablevision, Inc. v. City of Morganton*, No. SH C 86-5 (W.D. N.C. July 9, 1986) (order retaining jurisdiction until resolution of state constitutional issue in state court); *Omega Satellite Products Co. v. City of Indianapolis*, No. IP-86-830-C (S.D. Ind. filed July 3, 1986); *Cox Cable Communications v. United States*, No. 86-79-1 MAC (M.D. Ga. filed Mar. 12, 1986); *Group W Cable, Inc. v. City of Santa Cruz*, No. C 84-7546 WWS (N.D. Cal. filed Nov. 29, 1984); *Pacific West Cable Co. v. City of Galt*, No. CIV S 83-1595 MLS (E.D. Cal. filed Dec. 22, 1983).

vision, the *Tornillo* principle as to natural monopoly and government regulation extends to cable speech.

Despite *Tornillo*, and its own earlier indications in *Midwest Video*, the Eighth Circuit held that an implied finding by the jury that the Jefferson City cable market is a "natural monopoly" was sufficient to justify the City's exclusive cable licensing scheme. (App. 10a-11a) It is the first appellate court to so hold. However, it also interpreted dicta from the Seventh and Tenth Circuits as supporting the view that " 'a natural monopoly' situation may justify an exclusive franchising scheme" (App. 7a-9a), citing *Omega Satellite Products Co., supra*, and *Community Communications Co., supra.*[19] This puts the Eighth Circuit, and, as their decisions are being interpreted, the Seventh and Tenth Circuits, in direct conflict with the positions of the District of Columbia and Ninth Circuits that "economic scarcity" cannot be used to justify curtailment of cable speakers' First Amendment rights. *Quincy*, 768 F.2d at 1449-50; *Preferred*, 754 F.2d at 1404-05.[20]

The Eighth Circuit has carved out a singular place for cable as the only medium of communication in which rights of expression are made to depend upon econometric calculations. Indeed, the court of appeals failed to recognize that even in the

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[19] A district court in *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976, 986-87 (D.R.I. 1983), *vacated and remanded for dismissal as moot*, 773 F.2d 382 (1st Cir. 1985), also used "economic scarcity" as a justification for intrusive governmental regulation of cable. The *Burke* court did not, however, address the question of exclusive licensing. Similarly, a district court in *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 547 (W.D. Ky. 1982), noted in dicta that cable "by nature, tends to be a natural monopoly".

[20] *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45-46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Telecommunications Research & Action Center v. FCC*, 801 F.2d 501, 507-09 (D. C. Cir. 1986), G. Shapiro, P. Kurland & J. Mercurio, *CableSpeech: The Case for First Amendment Protection* 122-26 (1983). This conflict has also generated confusion as evidenced by the Eighth Circuit's implication that the D.C. Circuit agrees with the position taken by the Seventh and Tenth Circuits. (App. 9a) The Eighth Circuit's reliance on *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985), to support its views on natural monopoly is totally misplaced. *See Century Federal*, App. 116a, n.15.

area of broadcasting, no court has suggested that if a market could economically support only one or two broadcast television stations, the FCC or local government could choose which two stations would be "permitted" to serve.[21] Thus, even if cable is more appropriately analogized to broadcasting than to newspapers—as the Eighth Circuit held—the invocation of "economic scarcity" or "natural monopoly" to curtail First Amendment rights is patently improper.

The Eighth Circuit doctrine is of such potentially dangerous application that it merits prompt examination by this Court. At a minimum, the Eighth Circuit's ruling means that whenever a city believes it can offer proof that a "natural monopoly" exists, the city can choose for its citizens who the cable licensee shall be—which, in turn, makes the constitutionally guaranteed right to speak dependent on an unhealthy and uncertain mix of politics and economics.

The First Amendment, no less than the antitrust laws, presupposes unimpeded competition in the marketplace to insure the airing of diverse views and to enable the public to choose the "ultimate winner" in serving the public.[22] Even assuming that cable service is often a natural monopoly, the First Amendment dictates that the choice of programmer and programming must be made by the marketplace—not by municipal officials creating an "unnatural monopoly".[23] The

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[21] As Professor Ronald Coase has observed with respect to broadcasting:

> [I]t is a commonplace of economics that almost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce . . . . It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resource. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates resources to users without the need for government regulation.

Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

[22] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945).

[23] Moreover, from a purely economic view:

> [E]ven if eventual monopoly is inevitable, competition provides an important guarantee that the winner will be the most efficient

possibility of temporary increases in inefficiency or cost is not a compelling reason for permitting government officials to pass judgment on the content of communications and the "character" of those who wish to communicate with potential subscribers to a cable system.

Fundamental liberties cannot be made to depend upon the ebb and flow of market conditions that are constantly changing—especially in an industry developing as rapidly as the provision of television programming.[24] The Eighth Circuit's ruling will require intricate economic proof and projections of market demand, entry barriers, and the relationship between size and production efficiency to attempt to determine the natural monopoly issue. That complex proof, and the assumptions on which it is based, will change over time, as such factors as local demographics, cable technology, and rates of economic growth change as well. Free speech should not depend on such shifting and uncertain factors. This Court recently noted that it

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> and responsive competitor, thus benefiting consumers during the period of competition and perhaps afterward as well . . . .

Owen, "Recent Developments in Cable Television Regulation", Regulatory Reform: Industry Regulation Committee Newsletter 5 (ABA Section on Antitrust Law, Dec. 1985, Vol. 1, No. 1).

From a diversity in speech view, the FCC has recently expressed concern about "local franchise practices that have protected cable systems from some types of actual or potential competition". FCC Fact Sheet Regarding Cable Carriage Decision, August 7, 1986, MM Docket No. 85-349, p. 2.

[24] As Judge (then Professor) Posner cautioned in 1969:

> To embrace regulation because an industry is today a natural monopoly and seems likely to remain so is to gamble dangerously with the future. To impose regulation on the basis of a prophecy that the industry will remain monopolistic forever may be to make the prophecy self-fulfilling.

Posner, *Natural Monopoly and Its Regulation,* 21 STAN. L. REV. 548, 636 (1969). Recent evidence of successful competition in other markets long thought to be natural monopolies—such as long distance telephone service and overnight mail delivery—raises serious questions about the historical claims that capital investment and scale economy considerations make cable a natural monopoly. *See, e.g.,* Owen & Greenhalgh, *Competitive Considerations in Cable Television Franchising,* 4 CONTEMPORARY POLICY ISSUES 69 (1986).

was not willing to risk the potential for error if rights at the heart of the First Amendment were to depend upon the complexities of factual economic proof. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 589-90 (1983).

Thus, whether the cable business is a "natural monopoly" in any locality must be irrelevant on the issue of whether municipalities can grant exclusive cable licenses. Monopolistic characteristics may arise only through competitive elimination *in* the market, not by a city-run license contest *for* the market, as endorsed by the court of appeals. If Central would have in fact provided a higher quality of programming and service than TCI, then Central could have built its system alongside TCI's and competed for viewers. For government to close the marketplace of ideas to all but one speaker, however, based on the assumption that the chosen speaker will provide the most desirable service, impermissibly usurps the role of the individual to choose for himself.

In addition, while the Eighth Circuit took comfort in believing that the regulation it was approving was not "content regulation" (App. 5a, n.4), exclusive licensing is inherently content-related, if not directly content-based.[25] When making the subjective determination of which publisher is best qualified to serve, there is great risk that municipal authorities will base their decision on the content of an operator's programming, even where the pertinent franchising ordinance purports to be "content neutral". Municipal officials can easily determine the nature of the programming carried by a given operator,[26] and

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[25] As noted in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 81 n.4 (1976) (Powell, J., concurring), one form of content-related regulation is the imposition of limits on the number of speakers.

[26] For example, municipalities can, as was done here, require prospective cable publishers to describe the nature and sources of their proposed programming and to describe their programming "philosophy".

Indeed, the court of appeals itself made the following evaluation of TCI's programming:

> TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the-art system with far more channels at a lower cost, and, accordingly, more variety
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> . . .

can choose, for example, to favor an operator who carries the "Playboy Channel" over one who carries the "Disney Channel".[27] Under an exclusive licensing system, local officials may also be inclined to license an operator who will not cast as critical an eye over city government. The very prospect of such scrutiny by officials inevitably inhibits the editorial and journalistic vigor of cable television programming.[28] Permitting the same institution that is being scrutinized, here, the municipality, to lessen the number of media voices by restricting electronic publishers to one, and that one chosen by the municipality, severely hampers the ability of the press to accomplish its special task.[29]

> of programming for the public. *It is difficult for us to see how, on this record, TCI's position enhances first amendment values* . . . . [I]t seems clear that Central's proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable. (App. 11a, emphasis supplied; *see also* App. 2a-3a, 15a, n.9 (citing evidence of the superiority of Central's *proposed* system), 19a, n.11)

However, it was not for the City, not for a jury, and not for the courts to decide that TCI's acknowledged First Amendment rights may be curtailed based on a subjective *post hoc* determination that its cable service is not the "best" for the community.

[27] *See* Lee, *Cable Franchising and the First Amendment*, 36 VAND. L. REV. 867, 922 (1983); *see also Cruz v. Ferre*, 755 F.2d 1415, 1422 (11th Cir. 1985).

[28] *See FCC v. League of Women Voters*, 468 U.S. 364, 408 (1984) (Stevens, J., dissenting) ("The court jester who mocks the King must choose his words with great care.").

Historically, incumbent cable operators seeking renewal, faced with the specter of a distress sale of their system should renewal not be granted, have been at the mercy of municipal franchising authorities. The Cable Communications Policy Act of 1984 (47 U.S.C. §§ 546, 555) has made it more difficult for cities to revoke existing licenses and provides for judicial review of any decision not to renew. However, the expense and time involved in a contested renewal proceeding still gives enormous leverage to the city government.

[29] *See FCC v. League of Women Voters*, 468 U.S. at 378-379. As the Court of Appeals for the Second Circuit has noted: "The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion." *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728, 733 (1985) (rejecting "natural monopoly" argument as reason to limit access to means of disseminating electronic information).

The court of appeals also rejected TCI's First Amendment argument on the ground that TCI was not "sincere" in its stated position that it would not object to the grant of a franchise to Central as long as its own license were also renewed. (App. 4a, 11a) TCI's desire (or not) for competition, however, is of no relevance to the constitutionality of Central's asserted property interest. It is difficult to fathom how TCI's lack of sincerity in accepting competition could render constitutional an otherwise unconstitutional property interest. In any event, Central has never lost its constitutionally protected interest in a *nonexclusive* franchise, regardless of TCI's alleged secret desire to maintain the only franchise.[30] Central appeared to have the required Council votes to obtain a franchise to compete with TCI, but declined to seek such a license. Even if TCI controlled the City Council (an assertion which was never proved, and which would seem to be conclusively refuted by the Council's conduct), Central could have sought judicial relief to enforce its First Amendment right to operate in Jefferson City. Central in fact sued the City in this action, alleging a First Amendment claim virtually identical to TCI's First Amendment defense (App. 95a-96a), but did not seek an order requiring the City to grant it a license to serve the City alongside TCI.

II. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW.

In cases such as this, where First Amendment rights are at stake, this court has counselled the courts of appeals to independently review the evidence. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984). Thus, even assuming that the purported existence of "natural monopoly" were a relevant factual dispute, the Eighth Circuit was obligated to review the record in light of *Bose*. The court

[30] The court of appeals' citation to this Court's decision in *Associated Press v. United States*, 326 U.S. at 19-20, in support of its conclusion indicates that it misunderstood the thrust of TCI's First Amendment defense. (App. 4a, n.3) TCI is not claiming immunity from the antitrust laws. Instead it claims that even if Central had made out all the other elements required to prove a Sherman Act violation (or a violation of state tort law), the First Amendment renders the claimed injured property right—an exclusive cable television license— illegal, thereby defeating recovery. *See, e.g., Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 634 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

of appeals, however, did not address TCI's *Bose* argument. The court only stated that there was "substantial support" in the record for the jury's implied finding that the Jefferson City market was a natural monopoly, citing one study of the market introduced by Central. (App. 10a)

That failure is significant, not only for its disregard of this Court's instruction in *Bose*, but also because it places the Eighth Circuit in conflict with other courts that, citing *Bose*, have expanded the scope of "constitutional facts" requiring independent appellate review. *See Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 542 n.3 (3d Cir. 1984) (appellate court free to draw its own inferences from the record in a case involving constitutionality of student prayer group in public school), *vacated on other grounds*, 106 S. Ct. 1326 (1986); *Lebron v. Washington Metro. Area Transit Auth.*, 749 F.2d 893, 897 (D.C. Cir. 1984) (allegedly deceptive poster advertisement); *Brasslett v. Cota*, 761 F.2d 827, 839 (1st Cir. 1985) (public employee's speech); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 535-38 (9th Cir. 1984) (findings under *O'Brien* analysis in adult use zoning), *rev'd on other grounds*, 106 S. Ct. 925 (1986). If those courts are correct in their conclusion that *Bose* applied to the subjects before them, then the Eighth Circuit has created confusion, if not direct conflict, among the circuits as to the meaning of *Bose*.

An independent review of the record on the natural monopoly issue would require the court to consider the evidence that the lack of competition in the City prior to the expiration of TCI's first license was due to the City's abuse of the rate control provisions in that license. Moreover, undisputed evidence indicated a very high penetration rate of cable television in Jefferson City—nearly 80%—which made it a good market to support more than one system.[31] Central claimed that its system would have cost $2.5 million to construct; the jury fully adopted Central's damage theory and awarded it $10.8 million in compensatory damages, *i.e.*, a 432% return on total

[31] As the district court noted, "Jefferson City provides a very attractive market for cable television . . . . [C]able television's market penetration has been extremely high in Jefferson City". (App. 39a, n.3)

investment after three years of hypothetical operation. Indeed, based on the proposed equity contribution of plaintiff's shareholders to the system ($540,000), the rate of return was 2000%. Such a profitable market belies the existence of a natural monoply.[32]

The failure of the Eighth Circuit (as well as the district court) to evaluate independently the significance of this evidence put TCI's First Amendment rights solely in the hands of a jury grappling with sophisticated economic evidence. That result cannot stand under *Bose*.

III. THE DECISION BELOW IS STRONGLY AT ODDS WITH THE *NOERR-PENNINGTON* DOCTRINE ESTABLISHED BY THIS COURT.

If exclusive licensing of speech is to be held constitutional based upon the concept of "natural monopoly", then the decision to grant speech rights is essentially a policy judgment committed to the political process, and the First Amendment guarantees a robust right to persuade government to act in one's favor.

In the antitrust context, this doctrine is recognized in the *Noerr-Pennington* doctrine. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).[33]

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[32] In *Olympia Equipment Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986) (Posner, J.), the Seventh Circuit reversed a jury verdict awarding damages which were based upon a 191% rate of return, and also reversed the trial court's remittitur which reduced the rate of return to 42%. The court found that even at the lower rate the projected damages "bore no relation . . . to economic reality", and concluded that "[a] rate of return so far in excess of market rates of return would be a magnet *drawing productive resources into the market—and confronting Olympia with competition from far more experienced firms*". *Id.* at 382 (emphasis supplied).

[33] For purposes of this Section we assume that TCI's conduct could be found to be within the antitrust and tortious interference laws absent *Noerr-Pennington* protection. TCI, however, never had an exclusive cable license and it never campaigned for an exclusive license during the renewal process. TCI consistently took the position that it did not oppose other licenses being granted as long as its license were renewed. Therefore, TCI was not engaged in anticompetitive activity or monopolization, and did not tortiously interfere with Central's economic expectations.

This Court in *Noerr* determined that, in order to insure the right to petition, occasionally unethical and unsavory activity would have to be countenanced. The Court noted that in the "no-holds-barred" battle between the trucking and railroad industries for "control of a profitable source of income":

> [E]ach group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, *except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.* 365 U.S. at 144-45 (emphasis supplied, footnotes omitted).

Thus, *Noerr-Pennington* protection extends even to an activity that falls outside "normally accepted" political conduct—*e.g.*, the deliberate deception of public officials—but that nonetheless constitutes clearly "political activity" designed to achieve government action. *See id.* at 140-42. *Compare* App. 19a, n.11.

The Eighth Circuit's interpretation of the scope of the *Noerr-Pennington* doctrine in this case constitutes a severe narrowing of the arena of protected political activity and an unwarranted expansion of the scope of the "sham" exception to the doctrine, contrary to this Court's decisions. Moreover, the decision conflicts with rulings in other circuits involving similar circumstances. *See Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975); *Rural Electric Co. v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847, 850 (10th Cir. 1985), *aff'g*, 602 F. Supp. 105, 108-09 (D. Wyo. 1983). The ruling in this case is symptomatic of the problems lower courts are having applying the *Noerr* line of decisions without further guidance from this Court.[34]

The issue raised by this Petition presents to the Court an

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[34] Although this Court has considered cases involving *Noerr-Pennington* questions since *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), it has not within the past 14 years clarified the parameters of antitrust immunity in the legislative setting, including the scope of the "sham" exception.

opportunity to provide clear guidance to the lower courts on the application of the *Noerr* principle and the "sham" exception—an area which one commentator, as early as 1977, described as "difficult" to apply and "plagued by considerable confusion".[35] The subsequent decade has not seen the confusion and difficulty abate.[36]

This case involves a heated political dispute concerning the cable television franchising process, fueled by opposing positions taken by Central and TCI, as well as divisions within the City Council. During the more than a year in which the RFP process wore on, TCI, *and* Central, *and* the City all apparently engaged in activity about which none of them can be very proud, judging from the accusations and counter-accusations which were made by the parties. However, the Sherman Act was not designed as a general code of ethics governing political, as opposed to economic, activity. *See Noerr*, 365 U.S. at 140-41. Yet the Eighth Circuit, by interpreting *Noerr* to immunize only activities that "provide the City with information on which

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[35] Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the* Noerr-Pennington *Doctrine*, 45 U. CHI. L. REV. 80, 104 (1977).

[36] *See, e.g., Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 813 (2d Cir. 1983) ("To be sure, the contours of the sham exception [to *Noerr-Pennington* protection] are far from clear; the courts have themselves had difficulty defining the doctrine."), *cert. denied*, 464 U.S. 1073 (1984); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1155 (7th Cir.) (the *Noerr* and *Pennington* cases give little definition of what activities are sham, *i.e.*, not petitioning in the legislative and executive settings), *cert. denied*, 464 U.S. 891 (1983).

Moreover, many courts have held that, under *Noerr*, the Sherman Act was not intended to regulate political conduct at all, and thus the independent illegality of such conduct is irrelevant to the doctrine's application. *See, e.g., Cow Palace, Ltd. v. Associated Milk Producers, Inc.*, 390 F. Supp. 696, 701-02 (D. Colo. 1975) (bribery and illegal campaign contributions are not subject to antitrust sanctions just because they are illegal); *Schenley Indus., Inc. v. N.J. Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872, 885-86 (D.N.J. 1967) (lobbying activities that are illegal independent of the Sherman Act are "irrelevant for antitrust purposes"); *Blank v. Kirwan*, 39 Cal. 3d 311, 325-28, 703 P.2d 58, 67-69, 216 Cal. Rptr. 718, 726-28 (1985) (antitrust laws inapplicable even if bribery shown).

to base a reasonable choice" (App. 20a, n.11), has in effect established just such a code—one that requires a standard of conduct in the political arena that is unsupportable under this Court's precedents.

For example, the court of appeals approved a jury instruction that permits antitrust liability to be imposed upon a finding that a defendant has engaged in conduct that includes any form of "threats", "intimidation" or "coercion":

> In deciding whether defendants engaged in any unlawful conduct in this case, you are instructed that you may not consider defendant's legitimate lobbying efforts with the Jefferson City officials. The defendants are entitled under the law to use genuine efforts to influence public officials *but if in fact defendant's lobbying activities included threats, intimidation, coercion or other unlawful acts,* then you may find that such activities were not genuine efforts to influence public officials and you may consider those acts to have been unlawful conduct. (App. 19a, emphasis supplied)

The italicized language in the instruction excludes all "threats", "intimidation", or "coercion" from conduct protected under *Noerr,* thereby adopting the Ninth Circuit's narrow view of the doctrine. *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.) ("there can be little reason to extend the special immunity of *Noerr* and *Pennington* to a type of 'communication' which includes threats and other coercive measures. There is no room for such tactics in a democratic system."), *cert. denied,* 404 U.S. 826 (1971).

As *Noerr* demonstrated, however, political lobbying often involves activity which, depending on one's perspective, can easily be characterized as "threats", "intimidation" or "coercion". For instance, the court of appeals recognized that TCI's public announcement that it would turn off its system if its license were not renewed (thereby depriving the City of most television reception for an extended period) was protected conduct. (App. 16a) Yet, this statement obviously constituted a "threat", which certainly "intimidated" City officials and

residents, and in the end was a determinative factor in "coercing" the City to renew TCI's franchise. *See* pp. 6-8, *supra.* Similarly, the trial court's instruction let the jury impose liability on the basis of "misstatements of fact" (App. 14a) that might have "intimidated" various persons. While it is not clear if such deception is within *Noerr* when it occurs in the adjudicatory context (*California Motor Transport Co., supra*), it is clearly protected in the legislative arena, where TCI's conduct was directed.

Moreover, the challenged instruction permitted the jury to apply its own sense of moral rectitude to TCI's conduct, and to punish conduct which should be protected under *Noerr-Pennington.* For example, the court found that the jury could have assessed liability on the basis of TCI's withholding of the franchise fee owed to the City as a set off against damages recoverable in TCI's suit against the City. (App. 24a)[37] This was not illegal, and was at most a form of economic coercion on the City. In terms of the antitrust laws, this should stand on no different footing than a threat to withdraw campaign contribution pledges if the official refuses to vote in the manner desired by the contributor.[38]

The court of appeals has blurred the demarcation previously set by this Court between acceptable and unacceptable political conduct, and relegated the right to petition to activity a jury later finds to be "legitimate lobbying".[39] Such a broad

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[37] Although Central initially claimed that TCI's suit against the City was a "sham", it withdrew that claim just before the case went to the jury.

[38] *See Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers,* 542 F.2d 1076, 1081 (9th Cir. 1976), *cert. denied,* 430 U.S. 940 (1977). The court also found liability supported by the implied jury finding that TCI's negotiations with the City violated Missouri's "sunshine" laws (although the jury was never instructed on the sunshine law). (App. 24a) This is the first court to hold that a violation of state procedural laws incurs antitrust liability, or that the Sherman Act was designed to police enforcement of such laws.

[39] Indeed, the confusion existing over where the line of acceptable conduct is crossed under *Noerr-Pennington* is illustrated graphically by the fact that the Eighth Circuit itself had previously ruled that the same type of conduct condemned here was within the

sweep cannot square with this Court's prior teachings on the subject.

The Eighth Circuit's treatment of the *Noerr-Pennington* doctrine in this case is also at odds with decisions by the Seventh and Tenth Circuits.

The Seventh Circuit in *Metro Cable, supra,* examined allegations of an antitrust conspiracy brought by the loser in a battle for a city cable franchise in Illinois. The plaintiff alleged that the defendants, including the mayor and a city alderman, agreed to prevent plaintiff from operating a cable system in the city. For their part in the agreement, the city officials received "substantial" campaign contributions. During the campaign, the plaintiff was denied a hearing and defendants willfully misrepresented facts to the city's planning and finance committee. 516 F.2d at 222-23. The court of appeals affirmed the dismissal of the complaint. The court held that since the action of the city council was lawful, "concerted efforts to induce [that action]" cannot support an antitrust violation

> if those efforts were genuinely aimed at inducing the governmental actions and were not a pretext for inflicting on plaintiff an injury not caused by any governmental action. Unlike the injury to plaintiffs in *California Motor Transport,* the injury [here] . . . was caused by the governmental actions of the city council which the defendants genuinely and successfully attempted to induce the city council to take. *Id.* at 229.[40]

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protection of the doctrine. *See, e.g., Mark Aero, Inc. v. Trans World Airlines, Inc.,* 580 F.2d 288, 296 (8th Cir. 1978) (campaign to induce government officials to refuse to take action favorable to a competitor shielded by doctrine even though allegedly accompanied by misrepresentations and "economic coer[cion]"); *Missouri v. National Organization for Women, Inc.,* 620 F.2d 1301, 1314-19 (8th Cir.) (use of economic boycott protected; *Noerr* protection extends to state law claims of tortious interference), *cert. denied,* 449 U.S. 842 (1980).

[40] The court also ruled that the alleged participation of the mayor and alderman did not take the case out of *Noerr's* protection. *Id.* at 230. *Accord, Rural Electric,* 602 F. Supp. at 109 ("Even if the conduct of various of the Defendants was unethical in interacting . . . [with] the City Council, such activity is also immune from suit under the antitrust laws when conducted in the context of lobbying the City Council as a legislative body.").

Clearly, the *Metro Cable* complaint would have survived attack under the Eighth Circuit's view of the *Noerr* doctrine. This is particularly true since the court of appeals also found that TCI's activities constituted a "sham" outside *Noerr-Pennington* protection because TCI's real purpose was to "extend" its "monopoly position", not to genuinely influence government. (App. 19a, 24a, n.14) The Seventh Circuit specifically held that even if there was a more general plan by defendants to achieve a monopoly for the defendant broadcast television station by warehousing the exclusive cable franchise for the city, "[t]he part of that overall plan that consisted of inducing the city council to grant [defendant] CATV a franchise *and to refuse plaintiff a franchise* is not . . . within the Sherman Act. . . ." 516 F.2d at 232-33 (emphasis supplied).

Since there can be no legitimate dispute that it was the act of the Jefferson City Council in awarding TCI the franchise that Central claimed caused it "injury" by denying it an exclusive license, and that TCI's conduct was "genuinely" directed at having the council take that very action (even if one were to assume TCI intended to achieve a *de facto* exclusive license), the Eighth Circuit's decision conflicts with *Metro Cable.*

The Eighth Circuit's holding that TCI's conduct could be found to constitute a "sham" is equally at odds with the decision in *Rural Electric:*

> Areeda and Turner point out, however, that such allegations [of 'sham' conduct in the legislative process] are virtually impossible to prove, and may, for practical purposes, be ignored. [P. Areeda & D. Turner, *Antitrust Law* ¶ 203 (1978)]. They also point out an obvious fact of significance in this action. In attempting to categorize an activity as merely a 'sham' lobbying, hiding behind the most frivolous of contentions, it must be remembered that "in a political forum, almost no contention can be characterized categorically as frivolous. . . . [A] contention cannot, by definition, be frivolous when it is actually adopted by a legislature, administrator, or court." *Id.*, paragraph 203(c).

602 F. Supp. at 108-09, *aff'd,* 762 F.2d 847.

This Court has defined mere "sham" conduct as conduct that is not a "genuine" attempt to influence governmental policies. By applying the "sham" exception where TCI did not bar Central's access to the City Council, the Eighth Circuit has greatly expanded the scope of the "sham" exception well beyond the broadest tolerable reading of this Court's decisions.

IV. THE EIGHTH CIRCUIT IMPERMISSIBLY ALLOWED THE JURY TO PRESUME CERTAIN CIRCUMSTANCES FROM WHICH TO INFER FACTS REGARDING PROXIMATE CAUSATION IN CONTRAVENTION OF THIS COURT'S PRIOR RULINGS.

In *Manning v. Insurance Co.*, 100 U.S. 693, 698 (1879), and *United States v. Ross*, 92 U.S. 281, 283-84 (1875), this Court held that where circumstantial evidence is used to prove a fact, the circumstances must be proved and not presumed. In other words, "inferences from inferences" and "presumptions resting on the basis of another presumption" are not permitted. *Ross*, 92 U.S. at 283.

At trial Central offered evidence that a TCI executive, Paul Alden, threatened the City's consultant and executives of Teltran.[41] However, the consultant still recommended TCI's competitors, and there was no evidence that Alden's threats *caused* Teltran to withdraw from the RFP. Hence, there was no showing that Alden's acts *caused* Central any harm. Nevertheless, the Eighth Circuit held, in a somewhat extreme example of *post hoc* speculation, that "the jury may have concluded that TCI's heavy-handed tactics frightened the mayor and some members of the City Council into awarding the franchise to TCI". (App. 16a) That ruling cannot stand in view of this Court's holdings in *Manning* and *Ross*.

The jury would have had to pyramid a number of inferences, in contravention to this Court's precedents, to reach a conclusion that Alden in any way affected the City's decision. It is undisputed that Central offered no evidence that Alden's threats were ever communicated to the Mayor or any City Council member. The jury would thus have had to infer that the knowledge of the City's attorneys who were told of the

[41] TCI did not contend that Alden's conduct was protected by *Noerr-Pennington*.

alleged threats in 1981 was conveyed to Mayor Hartsfield and, apparently, members of the City Council. Then the jury would have to infer that knowledge of this threat caused the Mayor and Council members to vote for TCI almost a year later. Whether the first inference is improper, the second inference clearly violates this Court's rule set down in *Manning* and *Ross*.

This Court should take the opportunity to reinforce the limits to which circumstantial evidence can be pushed. Those limits are designed to prevent injustice and their application is necessary here for precisely that reason.

CONCLUSION

This case raises issues of great significance to a burgeoning new industry and to the nation at large. Those issues, involving free speech and the petitioning of local government, are entwined with values at the very heart of the Constitution. For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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No. 86-

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TCI CABLEVISION, INC., COMMUNITY TELE-COMMUNICATIONS, INC., and TELE-COMMUNICATIONS, INC.,
Petitioners,

–against–

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 85-1805

CENTRAL TELECOMMUNICATIONS, INC.,

Appellee,

v.

TCI CABLEVISION, INC.,
COMMUNITY TELECOMMUNICATIONS, INC.,
AND TELECOMMUNICATIONS, INC.,

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 10, 1986
Filed: August 26, 1986

Before HEANEY and FAGG, Circuit Judges, and WOODS,* District Judge.

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* The Honorable HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

HEANEY, Circuit Judge.

This antitrust-monopolization case arises out of competition between TCI, Cablevision, Inc. (and two related corporations, collectively TCI) and Central Telecommunications, Inc. (Central), for a defacto[1] exclusive cable television franchise in Jefferson City, Missouri (the City).

I. FACTS.

TCI managed the City's cable television system for the Athena Cablevision Corporation from 1973 to 1978. In 1978, it acquired the assets of Athena in the City and was then awarded a three-year exclusive cable television franchise. Three months before TCI's franchise was scheduled to expire, the City initiated a "Request for Proposals" (RFP), or bidding process, to solicit bids to determine the recipient of the next franchise.

Two companies—Central and Teltran—submitted bids for the franchise.[2] TCI refused to participate, arguing that it had a first amendment right to continue to provide cable television services in the City, and that the City thus had no right to award an exclusive franchise to another company. The City contended that its cable television market was a "natural monopoly" and that it could not create competition for its cable TV market without offering an exclusive franchise.

TCI then began a campaign, accompanied by numerous unethical and illegal acts, to coerce the City to grant it the exclusive franchise. Nonetheless, after a preliminary vote in January of 1982 in favor of Central, the City Council voted in April, 1982, to grant the exclusive franchise to Central. Central was obligated under this franchise to provide substantially expanded services to subscribers at a cost less than they had

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[1] Although the franchises at issue in this case were nominally termed "nonexclusive", they were, in practical operation, exclusive. Accordingly, we generally term the de facto exclusive franchises simply "exclusive."

[2] TCI ultimately also submitted an application, but the City determined that the application could not be considered because it failed to comply with the RFP.

been paying. The mayor immediately vetoed this ordinance and the City Council was unable to override it. An ordinance was promptly submitted which proposed renewal of TCI's franchise. The Council deadlocked at a five-to-five vote and the mayor then cast the tie-breaking vote in favor of TCI. The TCI proposal provided fewer viewing channels and inferior picture quality at a higher monthly rate than did the Central proposal.

Central then brought this action against TCI, alleging that TCI had unlawfully interfered with the RFP process to deny Central the franchise and to retain an exclusive franchise for itself. After thirty-one days of trial, the court granted Central's motion for a directed verdict on TCI's counterclaims, and submitted the case to a jury on three theories: 1) that TCI had unlawfully conspired with the mayor and other City officials to retain its exclusive franchise in violation of Section One of the Sherman Antitrust Act; 2) that TCI had undertaken illegal anti-competitive actions to retain its monopoly of the Jefferson City cable TV market in violation of Section Two of the Sherman Antitrust Act; and 3) that TCI had tortiously interfered with Central's business expectancy in violation of the laws of the State of Missouri. The jury ruled in favor of Central on all three claims and awarded $10,800,000 in actual damages on its antitrust and state law claims and $25,000,000 in punitive damages on the state law claim. The court trebled the $10,800,000 award, and entered judgment for $32,400,000 on the antitrust claims and, in the alternative, $35,800,000 on the state law claim. TCI appeals, raising seven issues, each of which we deal with in turn.

II. DISCUSSION.

A. First Amendment Challenge to Exclusive Franchising Scheme.

TCI's first contention is that it has a first amendment right to remain in the City's cable television market with or without a franchise from the City, and that, therefore, Central could not have been damaged when it lost the exclusive franchise. We

reject this argument. Before reaching the merits of this argument, we note that there is a significant factual problem with it. The district court found:

> Defendants enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head-to-head competition in the market place. * * * [However] the jury [was not] swayed by any of these arguments [and] factual findings implicit in [its] verdict confirm that TCI's endorsement of head-to-head competition lacked sincerity. * * * There was substantial evidence that defendants were engaged in a calculated scheme to prevent plaintiff from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves. * * * The jury's conclusion that defendants * * * were responsible for plaintiff's exclusion from the Jefferson City market * * * completely undermines any attempt to pass the blame on to the city by way of an amorphous "First Amendment defense."

Central Telecommunications, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 903 (W.D. Mo. 1985).

Because we find substantial evidence in the over 7,000-page record in support of this conclusion by trial judge and jury, we think that TCI's first amendment defense fails on its facts because it did not seek to simply remain in the market but to continue its monopoly.[3]

Assuming arguendo that TCI was willing to compete head-to-head with any competitor, we find TCI's first amendment defense to be without legal merit. The district court held:

> [T]he grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation. The theory is that, where physical and economic factors render

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[3] Under the Supreme Court's decision in *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945), a member of the communications industry who conspires or engages in predatory conduct for the purpose of eliminating its competitors is fully liable under the antitrust laws.

> a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one competitor can survive in the market, it makes sense to allow the local government to choose the best[4] applicant.

Central Telecommunications, 610 F. Supp. at 899-900 (footnotes omitted), *citing Tele-Communications of Key West, Inc. v. United States,* 757 F.2d 1330, 1338 (D.C. Cir. 1985); *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 127 (7th Cir. 1982); and *Community Communications, Inc. v. City of Boulder,* 660 F.2d 1370, 1378-80 (10th Cir. 1981), *cert. dismissed,* 456 U.S. 1001 (1982).

The Supreme Court has not directly addressed this issue. In *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974), it rejected an argument that the natural monopoly characteristics of the newspaper market gave rise to a duty to provide public access to the press. However, it has approved "far more intrusive regulation of broadcasters than of other media [such as newspapers] * * * because of the inescapable physical limitations on the number of voices than can simultaneously be carried over the electromagnetic spectrum." *Quincy Cable T.V., Inc. v. F.C.C.,* 768 F.2d 1434, 1448 (D.C. Cir. 1985), *citing, e.g., F.C.C. v. League of Women Voters of California,* 468 U.S. 364, 82 L.Ed.2d 278 (1984). Thus, the question is whether cable television should be analyzed under the standards applicable to newspapers or those applicable to broadcasters.

TCI contends that cable television is entitled to "coextensive protection" with the press media. In its recent decision in *Los Angeles v. Preferred Communications, Inc.,* _____ U.S. _____, 106 S. Ct. 2034 (1986), the Court suggested that the cable medium may be distinguishable from the newspaper medium and that more government regulation of the cable medium may be permissible because cable requires use of

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[4] We note that there is no question here of content regulation in determining who would be the "best" applicant.

public ways and installation of cable systems may disrupt public order. There, a cable television company sued the City of Los Angeles and its cable franchising department, alleging that the City violated its first amendment rights by refusing to grant it a cable television franchise or to allow it access to cable facilities on the ground that it had failed to participate in an auction for a de facto exclusive franchise in the area. The district court dismissed the complaint for failure to state a claim. The United States Court of Appeals for the Ninth Circuit then reversed and remanded for further findings on whether the City's exclusive franchising scheme violated the first amendment where there was economic and physical capacity for more than one franchise. It stressed that the City's only defense was that allowing more than one cable operator would overly burden and disrupt public property and order. The Supreme Court affirmed, "on a narrower ground than the one taken by [the Ninth Circuit]," 106 S. Ct. at 2036, and refused, without development of a more detailed factual record, to set forth the legal standard for assessing first amendment challenges to cable-franchising schemes. The Court simply held that, given that the Los Angeles cable market was not a natural monopoly and that the only alleged justification for limiting the number of cable operators in the Los Angeles area entailed the use and disruption of public property and order, a remand was necessary for determination of whether the petitioner's first amendment rights outweighed the disruption alleged by the City. Justice Blackmun, with whom Justices Marshall and O'Conner joined, concurring, emphasized:

> I join the Court's opinion on the understanding that it leaves open the question of the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities. Different communications media are treated differently for First Amendment purposes. Compare, *e.g., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S. Ct. 2831, 41 L.Ed.2d 730 (1974), with *FCC v. League of Women Voters,* 468 U.S.

> 364, 381, 104 S. Ct. 3106, 3118, 82 L.Ed.2d 278 (1984). In assessing First Amendment claims concerning cable access, the Court must determine whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis. As this case arises out of a motion to dismiss, we lack factual information about the nature of cable television. Recognizing these considerations, *ante,* at 5, the Court does not attempt to choose or justify any particular standard. It simply concludes that, in challenging Los Angeles' policy of exclusivity in cable franchising, respondent alleges a cognizable First Amendment claim.

106 S. Ct. at 2038-39.

The Tenth and Seventh Circuits have held that, on the facts before them, cable television is more analogous to broadcasting than to newspapers, and that a "natural monopoly" situation may justify an exclusive franchising scheme. In *Community Communications v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981), Community Communications Corporation (CCC) had been operating an exclusive cable television system in certain neighborhoods of Boulder, Colorado, for many years. After several other companies expressed interest in operating cable TV franchises in other areas of the City, the City imposed a moratorium on CCC's expansion in order to provide other companies the opportunity to make bids to service the remaining parts of Boulder before CCC became so entrenched that new entry would be impracticable. CCC alleged that the moratorium violated the first amendment. The City contended that cable television is a natural monopoly and that if it was unable to grant de facto exclusive franchises for various neighborhoods, CCC would remain the only cable television operation in Boulder and its citizens would be denied access to diversity and state-of-the-art programing. The Court of Appeals reversed the district court's order enjoining the City from enforcing the ordinance, and ordered that all parties be frozen in their current circumstances until trial on the merits. The Court applied a balancing analysis, weighing the first amendment concerns against the asserted justifications for the ex-

clusive franchise scheme and held that "natural monopoly is a constitutionally permissible justification for some degree of regulation of cable operators." 660 F.2d at 1379. The Court emphasized that the extent of regulation permissible is narrowly limited by, among other possible factors,

> differences in (1) the degree of natural monopoly or "scarcity" characterizing the medium, (2) the pace and potential for technological change, or (3) the uses and possible uses of the medium such as two-way cable communications or even interconnection, [which] might make kinds of regulations constitutionally permissible in one medium that would be forbidden in another. But we caution: the power to regulate is not one whit broader than the need that evokes it. [Footnote omitted.]

Id.

The next year, the United States Court of Appeals for the Seventh Circuit also found that where a relevant cable television market is a natural monopoly, an exclusive franchise may be permissible consistent with the first amendment. In *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982), the City of Indianapolis awarded two de facto exclusive cable television franchises for certain sections of the City. A third cable operator also serviced certain apartment complexes in the City. Because it operated simply by installing satellite dishes at the complexes, and thus did not use any public way, it was not subject to the City's franchising ordinance. This company then sought a franchise so it could interconnect apartment complexes without the need to install new satellite dishes at each complex. After the City failed to act on its application, the company connected two complexes with a cable through a drainage culvert. The City ordered the company to remove the cable and the company refused and sought an injunction, on Sherman Act and first amendment grounds, forbidding the City from removing the cable or enforcing its franchising scheme. The district court denied the request for an injunction and the Court of Appeals affirmed, holding that on the first amendment challenge, "If Chapter

8-1/2 is invalid under the First Amendment (a question we emphatically do not decide) it is so because it lacks adequate standards and procedures, not because a city may not limit the entry of cable television companies." *Id.* at 129. It distinguished cable television from newspapers on the ground cable requires use of public ways and because television enjoys "universal access to the home * * * and [there is] a resulting felt need to protect children." *Id.* at 127-28. Accordingly, it stated that although natural monopoly is not a justification for exclusive franchising for newspapers, "The apparent natural monopoly characteristics of cable television provide * * * an argument for regulation of entry." *Id.* at 127-28. *See also Tele-Communications of Key West v. United States,* 757 F.2d 1330 (D.C. Cir. 1985) (Holding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's exclusive franchising scheme would violate the first amendment.) *But cf. Preferred Communications v. City of Los Angeles,* 754 F.2d 1396, 1404-05 (9th Cir. 1985), *aff'd and remanded on other grounds,* ___U.S.___, 106 S. Ct. 2034 (1986) (Although the Court did not reach the argument that natural monopoly justifies government regulation of cable television because it assumed that competition for cable services is economically feasible in the Los Angeles area, it implied that "natural monopoly" is not a justification for exclusive franchising.)

We recognize that there are profound first amendment implications inherent in the regulation of cable operators. Changes in technology such as were presented in the *Omega* case may require a different approach to exclusive franchising schemes. We are also aware of the difficulties inherent in the regulation of cable television programming. *See, e.g., Quincy Cable TV, Inc. v. F.C.C.,* 768 F.2d 1434 (invalidating F.C.C.'s "must carry" cable television regulations on first amendment grounds). *Cf. F.C.C. v. Midwest Video Corp.,* 440 U.S. 689, 59 L.Ed.2d 691 (1979) (invalidating as beyond F.C.C.'s jurisdiction rules requiring cable operators to make channels available for local access). Thus, we make clear, as did the Supreme Court in *Preferred Communications,* that we are

unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record. We are not faced here with a challenge to the details of Jefferson City's franchise regulations,[5] and we, of course, consider the "natural monopoly" question only in terms of the competing technologies offered by TCI and Central. TCI's brief states the first amendment issue to be: "Did plaintiff, which was seeking an exclusive cable television franchise that would deny others equal access to speak through the cable medium, have a protectable interest under federal antitrust or state tort law when it was not awarded the exclusive franchise?"

We hold that Central did have a protectable interest because it proved, to the satisfaction of the jury and the trial judge, that the "natural monopoly" characteristics of the Jefferson City cable market justified the City in offering a de facto exclusive franchise in order to create competition for its cable television market. There is substantial support in the record for these factual findings.[6] TCI gained its monopoly through an

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[5] Inherent in the City's authority to choose the "best" cable operator for the City is the issue of how the City may reach this conclusion. In this connection, we note that the RFP terms are directed toward providing the widest array of programing at the lowest cost, and do not seek to prohibit the communication of any message. Thus, the RFP deals primarily with rates, quality and geographic breadth of service and states:

> The City is establishing few requirements as it desires that all applicants have maximum freedom to develop their own innovative proposals. * * * The City is interested in receiving proposals for a system with the capacity of delivering at least 50 channels to subscribers and with * * * technical standards which exceed current FCC requirements. * * * The City is not interested in proposed capacity which will not be used or which will necessitate unreasonably high subscriber rates. The City is interested in a flexible system which can best accommodate the present and future needs of institutional users without unduly burdening the average subscriber.

[6] *See, e.g.*, plaintiff's exhibit (PX) 400 (Touche Ross study); 19 T. 86 (Testimony of John Clair Smith, summarizing Touche Ross study: "The basic conclusion is that * * * a direct house-to-house competition between two cable companies would not be financially feasible in Jefferson City, that the market would not support sustained house-to-house competition.")

earlier grant of a de facto exclusive franchise. Unless the City opened up competition *for* the market, TCI would have remained entrenched in its monopoly position. TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the-art system with far more channels at a lower cost, and, accordingly, more variety of programming for the public. It is difficult for us to see how, on this record, TCI's position enhances first amendment values. It is true that TCI has a first amendment interest in remaining as a cable television "speaker," but Central has a similar interest. Because the evidence shows that given the technology offered by the competing companies, there was economic capacity for only one speaker, it seems clear that Central's proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable.

In sum, we reject TCI's first amendment challenge for two reasons. First, the evidence reveals that TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly originally gained through the grant of a de facto exclusive franchise. Second, the evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time. Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market.

B. Noerr-Pennington Defense.

TCI contends that all but two of its allegedly anticompetitive actions, the threats of its corporate vice president to the City's consultant and a similar threat to a competitor, are protected activity within the purview of the *Noerr-Pennington* doctrine. This doctrine, derived from the cases of *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), exempts from anti-

trust liability[7] activities which are specifically designed to procure favorable governmental action, even when the underlying motivation and effect of the activities is anti-competitive. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, § 46.04 (1982).

In early 1980, the City considered holding out its cable franchise to competitive bidding. Shortly thereafter, TCI met with the mayor and attempted to persuade him to renew its franchise without a competitive bid process, so as to avoid a "frontal attack" by competitors. In December, 1980, the City issued its RFP, inviting any company, including TCI, to bid. Thereafter, the City hired Elmer Smalling as a cable television consultant to evaluate the various bids. TCI, upon learning that the City had hired Smalling, publicly attacked his qualifications in a defamatory manner.

On several occasions, from January of 1981 to the summer of 1981, Paul Alden, TCI's vice president and national director of franchising, telephoned Robert Brooks, chief operating officer of Teltran, a company which submitted a bid for the City's franchise, and threatened him that unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise. Teltran subsequently dropped out of the bidding process on the ground there was a "distasteful environment" in Jefferson City.

In February, 1981, Alden and Harold Farrow, TCI's attorney, met with City officials and attempted to pressure them

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[7] The district court stated that "[a]lthough the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which seek[ ] to assign liability on the basis of the defendant's exercise of its first amendment rights." *Central Telecommunications*, 610 F. Supp. at 896 n.7. Although the United States Supreme Court has not directly confronted this issue, this Court has indicated that it agrees with the principle stated. *See, e.g., In Re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1312 (8th Cir. 1985). We reiterate our agreement with this position—which is not challenged on appeal—at least with respect to the tortious interference claim at issue.

to abandon the RFP process and negotiate exclusively with TCI. In March of 1981, Alden called the mayor and threatened to turn the system off unless TCI's franchise was renewed. That same month, TCI filed a lawsuit against the City challenging the RFP process. During the litigation, TCI served on officials of the bank from which Central sought financing a subpoena seeking a very wide range of potentially confidential records. Central alleges that this was designed to destroy its financing.

In June of 1981, Alden approached Smalling and expressed TCI's displeasure with Smalling's participation in the RFP process. Alden threatened Smalling with statements like: "We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around[.] We are going to see that you are ruined professionally." PX 83. Smalling understood these statements to be a threat to the lives of himself and his family. At this same time, Warner-Amex (another large cable company) was a client of Smalling's. Alden contacted Warner-Amex about Smalling. Following the threats, Smalling lost Warner-Amex as a client. Smalling told City Attorneys Christopher Graham and Thomas Utterback about Alden's threats. PX 83. On July 6, 1981, Utterback wrote the mayor and suggested that the RFP process be abandoned because some of the parties were interfering with the competitive bid process. PX 84. Utterback also expressed these concerns in a memorandum to the City Council in which he described TCI as a "relentless corporate bully." DX 17, T. 128.

In the fall of 1981, TCI met with Utterback and agreed to negotiate privately for renewal of its franchise, although this secret agreement and the subsequent private negotiations violated the RFP, which specified that all negotiations would be open,[8] as well as Missouri's "sunshine law." Mo. Rev. Stat. §§ 610.010-.030. After the City Council voted on January 25, 1982, to provisionally grant the franchise to Central, TCI

[8] The RFP provides that "to insure that all negotiations will be open, no applicant shall contact any City Councilman or the Mayor outside the Council Chambers." PX 84A at 20(a).

refused to pay and withheld the prior year's franchise fees which were due and owing to the City in an amount exceeding $60,000. It had no basis for this withholding other than an attempt to subvert the RFP process.

Throughout this period, TCI continued to publicly announce that it would cut off service if it was not awarded the franchise, and it announced that it would not sell "one bolt" of its system to whoever received the new franchise and that it would "rather have [its system] rot on the pole" than sell it to a competitor at any cost. Further, TCI's system manager in Jefferson City told elderly residents of a senior citizens' home that TCI would cut off service if denied a franchise, and the residents would be without television for two years pending construction of a new system because the concrete walls of their residence would not allow reception of over-the-air stations.

Additionally, TCI accompanied its franchise battle with misstatements of fact. For example, in one City Council meeting, Alden misrepresented to the Council that TCI was the largest distributor of satellite dishes in the country, with an "exclusive" in Missouri, both "facts" he later admitted were untrue. TCI implied that only it could protect the City's cable system from destructive competition from satellite dishes. The district court also stated that an implication of this statement was that TCI would flood the City with satellite dishes unless it received the franchise. 610 F. Supp. at 895.

By April 5, 1982, the City reached an agreement to award the franchise to Central. At that point, the mayor, who had recused himself from the cable television issue for over a year due to an alleged conflict of interest, announced that he was reentering the cable television controversy, and he privately advised council members that he would veto any ordinance awarding a cable television franchise to Central. TCI and certain City officials, including the mayor, then met privately to negotiate a franchise for TCI. As part of the agreement, the mayor agreed to veto any award of a franchise to Central.

On April 20, 1982, the City Council passed the ordinance awarding a franchise to Central. The vote was six in favor and four against. The mayor vetoed the ordinance. The council then deadlocked five-to-five on awarding a franchise to TCI

and the mayor cast the deciding vote in favor of that company.[9] The next day, TCI dismissed its lawsuit against the City and paid the withheld franchise fees.

TCI's initial argument is that even though its agent, Alden, may have made coercive threats to Smalling and Teltran, which are not protected under *Noerr-Pennington*, these threats did no harm to Central and thus cannot serve as a basis for imposing liability. We disagree. The jury was given a proximate cause instruction and informed that they could only base liability on

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[9] The differences between Central's and TCI's proposals are outlined in PX 285. The Central proposal was superior in numerous respects. A few of the more significant advantages are summarized in the following chart:

COMPARISON OF CENTRAL TELECOMMUNICATIONS, INC., PROPOSAL WITH REQUIREMENTS OF FRANCHISE ORDINANCES NO. 9777 AND NO. 9778

[Awarding franchise to TCI]

Item	Central Telecommunications, Inc. Proposal	Ordinance No. 9777 & No. 9778
Addressable Converters	Provided to All Subscribers	Provided only to Subscribers Taking Expanded Service
Equipment for Interactive Services	Head end Equipment Installed	None
System Design	Single Residential Cable (42 Channels Downstream Capacity, 4 Channels Upstream Capacity)	Present System Expanded From 12 Channels to 21 Channels Downstream Capacity Within 12 months
	Single Institutional Network Cable	No Institutional Cable
	2 Satellite Earth Stations	1 Satellite Earth Station
Services and Programming	Imported TV Stations—13	Imported TV Stations—11
	Pay TV Services—4	Pay TV Services—2
	FM Radio Service—23 Stations	FM Radio Service—"in Excess of" 15 Stations
Initial Rates	Basic TV Service:	Basic TV Service:
	Tier I (21 Channels)—$6.00/Month	Tier I (12 Channels)—$6.55/Month
	Tier II (38 Channels)—$8.00/Month	Tier II (21 Channels)—$8.55/Month
	Pay TV Service:	Pay TV Service:
	Home Box Office $7.95/Month	Home Box Office $9.95/Month
	Showtime $8.45/Month	Showtime $9.95/Month
	Cinemax $9.95/Month	—
	Movie Channel $7.95/Month	—

acts which were not genuine efforts to influence City officials. Giving Central the benefit of all reasonable inferences to be drawn from the record, the jury may have concluded that TCI's heavy-handed tactics frightened the mayor and some members of the City Council into awarding the franchise to TCI.

Additionally, TCI contends that even if Alden's threats harmed Central, the verdict must be set aside because we have no way of knowing whether the jury relied on these threats or on protected conduct in assessing liability against it. We reject this argument for several reasons:

First, the parties agreed to submit the case to the jury on a general verdict instruction and form, and there is evidence on the record as a whole to support the verdict. *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147, 150 (8th Cir. 1982); *Bio-Rad Laboratories, Inc. v. Nicolet Instrument Corp.*, 739 F.2d 604, 607 (Fed. Cir. 1984), *cert. denied,* 105 S. Ct. 516 (1985) ("In the absence of special interrogatories we presume the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury.").

Second, TCI was under no obligation to continue to provide service to the residents of Jefferson City after its franchise expired, and it certainly had the right to inform City officials, its customers and the public at large of its intent not to do so. Likewise, TCI was under no obligation, except as required by the franchise agreement, to sell its cable television system to its successor, and it had a clear right to inform City officials, its customers and the public at large that it would not do so. *Cf. United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 61 (D. Minn. 1971), *aff'd,* 410 U.S. 366, 368 (1973); *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509 (10th Cir. 1984), *aff'd on other grounds,* —— U.S. ——, 105 S. Ct. 2847 (1985); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied,* 436 U.S. 956 (1978).

Had TCI made a simple clear request that the jury be so instructed, it would have been error to refuse the request. But it appears from the record as a whole that TCI was not satisfied with this approach. It rather wanted and requested a broader instruction that would have immunized other conduct which the

jury could well have found unlawful.[10] The district court refused to give TCI's overly broad, long and confusing *Noerr-Pennington* instructions, preferring more concise and understandable instructions and allowing TCI to argue at length before the jury that all of its activities were genuine lobbying

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[10] TCI proposed the following *Noerr-Pennington* instructions:

NOERR-PENNINGTON—GENERAL

The Constitution ensures the right of all persons and corporations, whether acting individually or in concert, to petition government for political action, recognizing that persons in the exercise of these constitutional rights naturally will petition government for political action that is favorable to their particular interests and unfavorable to the interests of others. The Supreme Court has declared that this right to petition government for political action is paramount, and that the concerted effort of various parties genuinely to influence public officials does not in any way violate the law regardless of intent or purpose. Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws even though the efforts are intended to eliminate competition.

Similarly, the Constitution protects a person's right of access to the courts for resolution of disputed issues. The antitrust laws are not violated when a person files a suit, even if he hopes and intends that the judge or jury will enter verdicts which will injure his competitors.

In short, activity which is intended to influence or cause official governmental action—whether by an individual such as a mayor, by a legislative body such as a City Council, or by judges and juries—does not violate the law, regardless of the intentions of the persons engaging in such activity.

NOERR-PENNINGTON—APPLICATION TO THIS CASE

To the extent that you find that defendants engaged in legitimate efforts to influence governmental action or to seek redress for its grievances through the courts, you are directed that you cannot find the defendants liable for any of the claims asserted by plaintiff based upon such activity. For example, if you were to find that all of defendants' actions about which plaintiff complains fit into this category of legitimate attempts to influence official action or to vindicate rights through the courts, then you could not find defendants liable for any of the offenses charged. That is, if you should conclude from a review of the evidence that defendants did nothing more in this case than take actions for the purpose of persuading the City to award them a cable television franchise on some basis, then you may not find that defendants committed any of the offenses charged, even if you believe that the purpose or necessary effect of such actions was to exclude plaintiff from obtaining a franchise. On the other hand, if you were able to find that none of defendants' actions fit into that category, then you would simply assess those actions under the standards we have already discussed and without regard to this

efforts protected under *Noerr* and the threat to turn off service was lawful because TCI could not continue to provide service without a franchise. Under these circumstances, it is difficult to fault the district court judge for instructing the jury as it did and in permitting TCI to argue that it was simply exercising its first

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instruction. Finally, if you find that some of defendants' actions were legitimate attempts to influence governmental action but that some were not, then when you decide whether the evidence establishes that defendants committed any of the charged offenses, you must exclude from your consideration those actions which you find did in fact fall into that category, for they may not form the basis—in whole or in part—for any liability.

NOERR-PENNINGTON-EXCEPTIONS

However, the activity we are discussing must consist of genuine efforts to influence governmental action or to vindicate rights through the courts. Protection does not extend to purported petitioning that is a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is, protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any government action. Thus, you must consider whether defendants' activities were not really an attempt to influence an official to take official action, but instead were an attempt to interfere directly with the business of plaintiff. When deciding this question, you must consider the intent of defendants in taking such actions. If you find that their intent was to obtain some governmental action, no matter what the action was, then these activities were genuine. The success of defendants' efforts is evidence of their genuineness.

In the context of defendants' lawsuit against the City, about which you have heard some evidence, you must decide whether defendants filed the suit with the hope of obtaining a judicial ruling in their favor, or whether the suit was only intended to directly injure plaintiff in some manner. The extent to which a lawsuit involves legitimately disputed issues is circumstantial evidence of the genuineness of the suit. The knowledge that defense of the litigation might impose burdensome costs upon the City would *not* be sufficient to establish that defendants brought the suit in bad faith, in an attempt to injure plaintiff.

Finally, the Constitution does not protect attempts to influence governmental action by methods which are illegal in and of themselves; for example, by bribery of governmental officials. Such actions are not legitimate attempts to petition the government.

In sum, you must decide whether all or some of defendants' activities were legitimate and genuine efforts to obtain a franchise from the City. All such efforts must be excluded from your consideration of this case because they cannot—as a matter of law—form the basis of liability for any of the offenses charged.

amendment rights when it engaged in the course of conduct that it did.

Third, the trial court's jury instructions adequately informed the jury of the *Noerr-Pennington* doctrine and that it could find that TCI's activities were protected activities within the parameters of this doctrine. Instruction Number 15 informed the jury that it could "not consider TCI's 1981 lawsuit against Jefferson City to have been unlawful conduct even if it was designed to eliminate competition." Instruction Number 14 informed the jury:

> In deciding whether defendants engaged in any unlawful conduct in this case, you are instructed that you may not consider defendant's legitimate lobbying efforts with the Jefferson City officials. The defendants are entitled under the law to use genuine efforts to influence public officials but if in fact defendant's lobbying activities included threats, intimidation, coercion or other unlawful acts, then you may find that such activities were not genuine efforts to influence public officials and you may consider those acts to have been unlawful conduct.

TCI contends that Instruction Number 14 allowed the jury to base its verdict on activities which were lawful under *Noerr-Pennington.* We reject this argument because we find that the instruction's statement that *Noerr-Pennington* protects all "genuine" lobbying efforts but does not protect "threats, intimidation, coercion, or other unlawful acts" which were "not genuine efforts to influence public officials" was proper under the case law, the facts of this case, and in light of the instructions submitted by the parties.

In *Noerr,* the Court stated that when a "campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor * * * the application of the Sherman Act would be justified." *Noerr,* 365 U.S. at 144.[11]

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[11] The *Noerr* court noted, however, that the defendants' activities—even though they included misrepresentations and unethical conduct—were not covered by the Sherman Act at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. 365 U.S. at 140-

In *Pennington,* 381 U.S. 657, however, the Court cautioned:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed.

Id. at 670.

In *California Motor Transport,* 404 U.S. 508, the Court first applied the so-called "sham exception" to the *Noerr-Pennington* doctrine. There, the defendants maintained a trust fund which they used to oppose all license applications by their competitors with or without probable cause and regardless of the merits of the applications. The Court affirmed the Ninth Circuit's reversal of a district court order dismissing plaintiff's antitrust action on *Noerr-Pennington* grounds because it found that the defendant's activities may not have been genuine efforts to influence the government but instead may have been simply a "combination of entrepreneurs to harass and deter their competitors from having 'free and unlimited access' to the

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42. The unethical conduct referred to involved the defendants' use of the so-called "third-party technique"—a misrepresentation through which the railroad defendants' attempts to gain passage of laws favorable to railroads and unfavorable to the plaintiff trucking companies were made to appear as originating from independent parties. However, even though the use of this third-party technique involved misrepresentation as to the source of the petitioning, the position advanced by the defendants—essentially that trucks were harmful to the state's highways and interfered with motorists' rights — was a legitimate one, "conducted along lines normally accepted in our political system," *id.* at 145, even though anti-competitive. The case before us is distinguishable in that the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor, to disturb the political process and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost. Much of TCI's "lobbying" made no attempt to provide the City with information on which to base a reasonable choice but, instead, sought to subvert the franchising process.

agencies and courts, to defeat that right by massive, concerted, and purposeful activities." 404 U.S. at 515.

In *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973). [sic] the Court described *California Motor Transport* holding

> that the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the "mere sham" exception announced in *Noerr.*

Id. at 380.

This Court has on numerous occasions explored the meaning of the *Noerr-Pennington* doctrine and its "sham" exception. For example, in *Mark Aero, Inc. v. Trans World Airlines, Inc.,* 580 F.2d 288, 296-98 (8th Cir. 1978), we summarized the facts and holdings in *Noerr, Pennington* and *California Motor Transport* and then examined the meaning of the "sham exception:"

> [T]he essential element of the sham exception, whether employed in an adjudicative or nonadjudicative setting [is] an absence of a genuine effort to influence government but, rather, an intent to injure a competitor directly.
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> * * * *
>
> The fundamental question presented in each case involving the "sham" exception, whether argued in a nonadjudicative or an adjudicative setting, is the question of intent. * * * As always in deciding questions of intent, the court considers all of the surrounding circumstances and assigns to each circumstance an appropriate weight, dependent upon the function and significance of each. Thus in *California Motor* the Court considered the "manner of exercise of the right of association and petition," the defendants' other activities against competitors, and the adamant stand taken in defendants' opposition to other applications, all to ascertain whether there was a true intent to injure competitors directly rather than to influence governmental action. The distillation of all of the applicable factors in each case governs the decision as to true intent, whether it is to directly injure competitors rather than to influence governmental action. In *California*

> *Motor* a consideration of all of the factors lead the Court to conclude that the allegations came within the sham exception in the *Noerr* case, "as adapted to the adjudicatory process" in that the defendants' purpose was to deny a competitor "free and meaningful access to the agencies and courts."[12]

We also quoted with approval from an antitrust commentator that "[c]onstruing the sham exception as enunciated in *Noerr* to include all activity not genuinely designed to influence the government is more consonant with the Court's central ruling." 580 F.2d at 296, *citing D. Fischel, Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine,* 45 U. Chi. L. Rev. 80, 105 (1977).

In *Westborough Mall v. City of Cape Girardeau,* 693 F.2d 733 (8th Cir. 1982), *cert. denied,* 461 U.S. at 945 (1983), we again elaborated on the "sham" exception to the *Noerr-Pennington* doctrine. There we held:

> [T]he defendants may not be protected by *Noerr* because their legitimate lobbying efforts may have been accompanied by illegal or fraudulent actions. *See Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150,* 440 F.2d 1096, 1099 (9th Cir.), *cert. denied,* 404 U.S. 826, 92 S. Ct. 57, 30 L.Ed.2d 54 (1971); *Woods Exploration & Producing Co. v. Aluminum Co. of America,* 438 F.2d 1286, 1296-1298 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047, 92 S. Ct. 701, 30 L.Ed.2d 736 (1972). The *Noerr-Pennington* doctrine was not "intended to protect those who employ illegal means to influence their representatives in government." *Sacramento Coca-Cola Bottling Co. v. Chauffeurs, Teamsters & Helpers Local 150, supra,*

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[12] The plaintiff in *Mark Aero* was an air taxi operator who wanted to reopen the Kansas City Municipal Airport for commercial flights. Two of the plaintiff's competitors opposed the reopening by conducting a publicity campaign and by exerting pressure on public officials. No illegal activities were alleged, as in the case before us, although Mark Aero did allege that the defendants "induced others to make false and misleading statements" and used "economic coercion" on City officials. We held that the defendants' activities were protected by *Noerr-Pennington* because "none of the defendants' alleged wrongful acts constitute more than joint efforts to influence the City officials' decision in the airport controversy." 580 F.2d at 296.

> 440 F.2d at 1099. *See generally* 7 Von Kalinowski, Antitrust Laws and Trade Regulation, *supra*, § 46.04[3] at 46-55. In *Gorman Towers, Inc. v. Bogoslavsky*, [626 F.2d 607 (8th Cir. 1980)] *supra*, we recognized that actions beyond "traditional political activity" may not be protected by the *Noerr* exemption. *Id.*, 626 F.2d at 615. Because the plaintiffs have presented facts that support an inference of unlawful conduct—city officials may have been induced by the May-Drury defendants by means other than legitimate lobbying to illegally revert plaintiffs' C-4 zoning—the *Noerr* doctrine may not be relied upon to support the district court's grant of summary judgment. *See Federal Prescription Service, Inc. v. Pharmaceutical Ass'n*, 663 F.2d 253, 266 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928, 102 S. Ct. 1293, 71 L.Ed.2d 472 (1982).[13]

693 F.2d at 746.

In the *Sacramento* decision cited in *Westborough Mall*, the United States Court of Appeals for the Ninth Circuit stated:

> [I]t does not seem to this Court that the doctrines of *Noerr* and *Pennington* were intended to protect those who employ illegal means to influence their representatives in government. These doctrines were enunciated to see that the antitrust laws did not impede the free flow of communication between the people and the government. But there can be little reason to extend the special immunity of *Noerr* and *Pennington* to a type of "communication" which includes threats and other coercive measures. There is no room for such tactics in a democratic system.
>
> In the case before us it was alleged that the defendant unions influenced the State Fair officials by means of threats, intimidation and other coercive measures. The doctrines of *Noerr* and *Pennington* are not, therefore, applicable.

440 F.2d at 1099.

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[13] TCI alleges that the defendants in *Westborough Mall* attempted to bribe public officials. However, our reading of that case reveals that it did not invoke the sham exception on grounds of bribery but on the ground that the plaintiffs might be able to prove an illegal conspiracy between defendants and the City which included illegal private negotiations such as those at issue in the case before us.

See also In Re IBP Confidential Business Documents Litigation, 755 F.2d 1300, 1313 (8th Cir. 1985) (*Noerr-Pennington* doctrine cannot be extended to "activities which, although 'ostensibly directed toward government action,' are actually nothing more than an attempt to harm another" or to "false communications" or to tortious, violent, defamatory or other illegal acts [citations omitted].).

We think that the trial court's jury instruction adequately informed the jury of the *Noerr-Pennington* doctrine and the sham exception.[14] The instruction does not have the problem that the instruction which was disapproved in *Pennington* had. It does not state that legal petitioning activities can be illegal if accompanied by anti-competitive intent. Instead, it describes the essence of the "sham" exception—were defendant's petitioning activities genuine attempts to influence government action, or were they designed to directly interfere with the business relationships of a competitor?

Finally, our review of the record reveals full support for the jury's and trial judge's conclusion that TCI overstepped the boundaries of *Noerr-Pennington* protection. Much of TCI's campaign was not directed at informing public officials or the public of TCI's position. Instead, TCI sought to distort the process by refusing to participate in the RFP process, by threatening the City's consultant and one of its competitors, by withholding the past due franchise fee, by attempting to interfere with Central's financing, and by coercing the City into holding private negotiations in violation of the RFP terms and Missouri's sunshine laws. Indeed, TCI's argument would

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[14] TCI also alleges that the trial court's conspiracy instruction "essentially negated" the *Noerr-Pennington* defense. We reject this argument. First of all, TCI did not specifically raise this objection below, and thus we could order a new trial on this basis only if the alleged error is "plain error." In any event, we find TCI's oblique argument to be completely without merit. We find nothing in the conspiracy instruction which negates the *Noerr-Pennington* instruction. The jury was informed that "each * * * instruction is equally binding upon you." Conspiracy Instruction Number 11 read along with Instructions Number 21 and Number 14 (*Noerr-Pennington*) fully informed the jury that before any antitrust liability could be imposed, it had to find that TCI "knowingly entered into a combination or conspiracy" and that in determining liability, it could not consider TCI's "legitimate lobbying efforts."

effectively repeal the sunshine laws and administrative laws prohibiting *ex parte* contacts. TCI's argument that *Noerr-Pennington* allows them to engage in excessive and intimidating conduct proved too much for the trial judge and jury, and it proves too much for us.[15]

C. State Action Defense.

TCI contends that Central could not have a cause of action under the antitrust laws because the City is immune under the state action doctrine. Central contends that this argument is without merit because there is no clearly and affirmatively expressed policy of the Missouri legislature directing the City to displace competition, and TCI's agreement with the City is not in furtherance of any such policy. Central also argues that, in any event, TCI did not raise its "state action" argument in its answer, motion to dismiss, motion for summary judgment, pretrial filings, or its statement of issues in this Court. It points out that, in fact, TCI took precisely the opposite position below, stating in its j.n.o.v. motion that the City's actions were not "state action." Although we doubt that TCI's "state action" argument has merit, we decline to reach it because "defenses

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[15] Central raises several other reasons why TCI's conduct was not protected under *Noerr-Pennington*. Although some of these arguments may have merit, we need not reach them here. Central argues that the *Noerr-Pennington* doctrine is inapplicable here because this case involves a municipality acting in an essentially commercial rather than in an executive, legislative or adjudicatory capacity. *See, e.g., Sacramento,* 440 F.2d at 1099; *Hecht v. Pro-Football, Inc.,* 444 F.2d 931, 941-42 (D.C. Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972); *George R. Whitten, Jr. v. Paddock Pool Builders, Inc.,* 424 F.2d 25, 33 (1st Cir.), *cert. denied,* 400 U.S. 850 (1970). Central also argues that TCI's conduct cannot be described as merely "political" in nature because the ultimate act it sought from the City, the award of a cable television franchise, is not protected "state action" because there is no clearly and affirmatively expressed policy in Missouri authorizing cities to displace competition in the cable television industry. *See, e.g., Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). Finally, Central argues that the *Noerr-Pennington* doctrine is inapplicable because the jury found that there was an illegal conspiracy between TCI and certain City officials, including Utterback and the mayor. *See, e.g., Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1566-67 (5th Cir. 1984), *cert. denied,*—U.S.—106 S. Ct. 788 (1986); *Duke & Co. v. Foerster,* 521 F.2d 1277, 1281-82 (3d Cir. 1975).

not raised or litigated in the trial court cannot be urged for the first time on appeal." *Gardner v. Meyers*, 491 F.2d 1184, 1190 (8th Cir. 1974).

D. Evidentiary Rulings.

TCI raises numerous objections to the trial court's evidentiary rulings and contends that the trial court gave improper and confusing instructions to the jury. After a thorough review of the record, the jury instructions as a whole, and the trial court's lengthy explanation of its evidentiary rulings and jury instructions, we find that many of TCI's objections were not properly preserved for appeal and, in any event, that the trial court did not abuse its discretion in its evidentiary rulings, that the jury instructions adequately stated the law, and that the court's allowance of ninety minutes per side for closing arguments was not an abuse of discretion.

E. Monopoly Power in a Regulated Market.

TCI contends that, as a matter of law, it could not have possessed monopoly power because Jefferson City regulated price and entry in the cable television business. We reject this argument. Monopoly power is the power to control prices or exclude competitors. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Here, TCI had the power to raise the price of "premium" channels without the approval of the City. Most significantly, TCI used its entrenched position and the various unethical or illegal practices outlined in our *Noerr-Pennington* discussion to exclude competition.

TCI miscites our decision in *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985), as establishing that a company cannot possess monopoly power in a regulated market. There, the United States Tax Court contracted on a yearly basis for court-reporting services. The court allowed contractors who performed satisfactorily to renew their contract at the previous year's rate. If, however, the contractor wanted to raise his price, the court put the contract out for bid. When National Reporting Company, which had the current contract, requested a price increase, the court let the contract out for bid. Alderson Reporting Company submitted a

bid more than 300 percent lower than National's bid, and received the contract. National then brought an antitrust action against Alderson, alleging that Alderson submitted a predatory below-cost bid with the intent to drive competitors out of the market and create a monopoly. We reversed a district court judgment in favor of National, and held that Alderson could not possess monopoly power because it did not have the power to control prices or exclude competition. National's theory was that Alderson submitted a predatory bid and then would increase prices the next year. However, we pointed out that as soon as Alderson raised its price, the contract would be put out for bid and that "[c]ompetition is alive and well in the relevant market." *Id.* at 1023.

That factual situation is completely inapposite to our case. Unlike TCI, Alderson had not threatened competitors into not submitting bids, and it took no other action to destroy the competitive bidding process. The mere fact that the Jefferson City cable market is regulated cannot hide the fact that TCI had monopoly power in the market, and it used that power and other methods other than superior ability to exclude competition. As the United States Supreme Court stated in *United States v. Otter Tail Power Co.*, 410 U.S. 366, 372 (1973), "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws."

F. Sufficiency of the Evidence on the Conspiracy Count.

TCI contends that we must overturn the jury's verdict on Section One of the Sherman Act because there is insufficient evidence of a conspiracy or combination. Central contends that TCI is merely repeating an argument rejected by the jury, and it argues that if there is any evidence supporting the jury's finding of a conspiracy, the finding must be upheld. *Citing Weiss v. York Hospital,* 745 F.2d 786, 814 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 1777 (1985). TCI contends that it was selected because this was the "best" business decision for the City, even though Central offered a state-of-the-art system with a greater number of channels and better picture quality at a lower price.

TCI stresses that there would have been an interruption in service if Central had been chosen, and that the mayor and other City officials were merely responding to this eventuality. "An inference of conspiracy is not warranted where the conduct is at least as consistent with legitimate business decisions * * * as with [anti-competitive joint action]." *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 884 (8th Cir. 1978).

Central contends that TCI's argument "emphasizes the innocuous and ignores the ominous." *Corey v. Cook*, 641 F.2d 32, 35 (1st Cir. 1981) (holding that concerted action by city officials and a parking lot operator designed to subvert normal commercial bidding and exclude the plaintiff violated Section One of the Sherman Act). Central contends that the record reveals abundant evidence that various City officials were coerced and pressured into an anti-competitive position. We find this a difficult question. Nonetheless, after reviewing the lengthy record in detail, we believe that overturning the jury's conspiracy verdict would require us to review the evidence *de novo* and to accord little respect for the verdict of what the trial judge termed was "an extremely attentive jury." *Central Telecommunications*, 610 F. Supp. at 894.

G. Damages.

1. Fact of Damage.

TCI contends that under *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir. 1962), an unestablished business cannot recover for injury to "business" under section 4 of the Clayton Act. There, we stated that a plaintiff may not recover antitrust "damages by reason of loss of anticipated profits in an anticipated business." *Id.* at 323. However, this statement must be read in light of the facts in *Duff*. Duff had operated a small weekly newspaper in Kansas City, Missouri. After eight years of non-publication due to a newsprint shortage during World War II, he unsuccessfully sought to reenter the newspaper business. He claimed that his inability to start up a newspaper again was due to an attempt by defendant to monopolize the market. The district court dismissed his antitrust action on the ground he had no "business or property" which could have been injured. This Court affirmed, finding: "After eight years

of non-publication appellant possessed neither business nor property, including goodwill, which could have been damaged[.]" *Id.* at 325. Stressing that Duff had not made any large capital expenditures, did not own a copyrighted name for a newspaper which had a value, and did not have subscription, advertising, or financing commitments, the Court stated that Duff "was in no different position than any stranger who might arrive in Kansas City with the desire or wish to enter the newspaper publishing field and who claimed that because of appellees' monopoly he was prevented from doing so." *Id.* at 323.

Although neither the Supreme Court or this Court has had occasion to expound on the meaning of *Duff*, at least seven of the Circuit Courts of Appeal,[16] as well as numerous district courts,[17] and the Supreme Court by implication[18] have ruled

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[16] *Parks v. Watson*, 716 F.2d 646, 659-60 (9th Cir. 1983); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); *Huron Valley Hospital Inc. v. City of Pontiac*, 666 F.2d 1029, 1033 (6th Cir. 1981); *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1978), *cert. denied*, 444 U.S. 1078 (1980); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 987-88 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Triangle Conduit & Cable Co. v. National Electric*, 152 F.2d 398, 400 (3d Cir. 1945); *Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.*, 166 F. 254 (2d Cir. 1908).

[17] *See, e.g., Bowl America, Inc. v. Fair Lanes, Inc.*, 299 F. Supp. 1080, 1095 (D. Md. 1969); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 307 (D. Colo. 1969).

[18] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-28, 23 L.Ed. 1562 (1969) (On the related question of whether the plaintiff, as a condition of maintaining a treble-damage action, must prove that he made a demand for the excluded product or service, the Court stated: "The issue is whether, once the embargo was lifted, Zenith wanted to enter, had the capacity to do so, and was prevented from entering by its inability to secure a patent license and by other operations of the English patent pool. Section 4 of the Clayton Act required that Zenith show an injury to its 'business or property by reason of anything forbidden in the antitrust laws.' If Zenith's failure to enter the English market was attributable to its lack of desire, its limited production capabilities, or to other factors independent of HRI's unlawful conduct, Zenith would not have met its burden under § 4." (Footnote omitted.)

that an unestablished business can recover future lost profits under the federal antitrust laws if a sufficiently advanced state of preparation for entering a market has been achieved. For example, the same year that *Duff* was decided, the United States Court of Appeals for the Fifth Circuit rejected a contention that *Duff* established that a business in the planning stage may never recover anticipated profits under the federal antitrust laws:

> Defendant's argument necessarily presupposes that when Congress authorized treble damage suits it meant to distinguish between the rights of persons who are put out of business and the rights of persons who are kept out of business by a conspiracy. It is unreasonable to suppose that such a distinction was intended by Congress. The purpose of the anti-trust laws is to promote competition and to prevent its restraint. This purpose is no less thwarted when a person who intends and is prepared to embark in trade is stopped at the outset, than it is when a going business is brought to a standstill. It is as unlawful to prevent a person from engaging in business as it is to drive him out of business. Thomsen v. Union Castle Mail S. S. Co., 2 Cir., 1908, 166 F. 251, 253. The restriction which defendants would place upon the meaning of the word "business" is unwarranted in the context of its Clayton Act usage.
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> * * * *
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> We see no conflict in the holding of the Duff case with the decision reached here. First, the Duff case presents facts entirely different from those under consideration here. Indeed, the trial court likened the plaintiff in Duff to a stranger who might enter Kansas City "with the desire or wish" to enter the newspaper publishing field; which is to say that the "desire or wish" is all the stranger had. No property was involved. In effect, the court held that there was no established business (good will) to which the name or trademark there involved attached.
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> * * * *
>
> [By contrast, the plaintiff here] was guilty of no lethargy or speculative assertion of a mere wish, desire or intention to

> engage in business. In July he bound himself by the terms of a contract, which the evidence indicates would have been in performance in December. The alleged conspiracy stopped him cold in November. It is our opinion that Young was "injured in his business or property".

North Texas Producers Association v. Young, 308 F.2d 235, 243 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963).

A respected commentator has aptly summarized the now-established majority view:

> The plaintiff will be deemed to have an existing "business" if he has an intention to do so and has made a sufficient degree of preparation toward entering the market or industry. The four elements that the courts have considered in determining the degree of intention and preparedness are:
>
> (1) the plaintiff's background and experience in his prospective business;
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> (2) affirmative action on the plaintiff's part to engage in the proposed business;
>
> (3) his ability to finance the business and to purchase the necessary equipment and facilities to engage therein; and
>
> (4) His consummation of contracts.

10 Von Kalinowski, Antitrust Laws and Trade Regulation, § 115.02[3][i] (1968) (footnotes omitted). *See also e.g.*, *Parks*, 716 F.2d at 660.

We agree with the conclusion of the United States Court of Appeals for the Fifth Circuit in *North Texas Producers Association* that *Duff* is consistent with this majority view, but simply holds that Duff had not shown sufficient business or property interests to recover for injury to "business or property" under section 4 of the Clayton Act.

The district court tracked this view by instructing the jury that "[i]t is necessary that plaintiff cause you to believe from

the evidence an intention and preparedness to enter the cable television market in order to recover for its loss in this case." TCI does not challenge this instruction on appeal. Our review of the record supports the jury's conclusion that Central had made sufficient preparations to enter the cable television business to recover for injury to "business" under section 4 of the Clayton Act. Central had experience and expertise in the cable field, had raised over $300,000 in capital with commitments of an additional $200,000 in capital, had secured financing commitments in excess of $1.5 million, had submitted detailed feasible plans for its cable system in Jefferson City and had secured the vote of the City Council for an operating franchise.

TCI also contends that the tortious interference verdict must be reversed because under Missouri's tortious interference law, an unestablished business cannot recover anticipated profits unless plaintiff proves past income and expenses as the basis for computing them. *Citing Coonis v. Rogers,* 429 S.W.2d 709, 713-14 (Mo. 1968). However, our review of Missouri law reveals that this argument is too extreme. A more detailed, accurate and recent description of Missouri law was provided in *Budget Rent-A-Car v. B & G Rent-A-Car,* 619 S.W.2d 832, 836-37 (Mo. App. 1981), where the court wrote:

> [T]he loss of profits, whether past or future, claimed to arise out of exclusion from a market is customarily not susceptible of detailed or direct proof, and * * * unless proof of an inferential character is permitted, the result would be to immunize a defendant from the consequences of his wrongful acts. That principle has been frequently enunciated by the Supreme Court of the United States in the context of actions to recover damages resulting from violations of the Federal antitrust laws. * * * The principle is equally applicable where the claim of lost profits arises from a violation of fiduciary obligations or breach of contract. * * *
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> * * * "The assessment of damages by a trial court sitting without a jury will not be set aside unless manifestly

erroneous; and may be upheld if it falls within the range of estimates given by expert witnesses."

[There has been an] evolution away from the demand for proof of certainty in damages in actions of this nature in * * * Missouri. * * * Anticipated profits were generally not recoverable. *Coonis v. Rogers*, 429 S.W.2d 709, 714 (Mo. 1968), but note the further quote, " 'They [anticipated profits] may be recovered only when they are made reasonably certain of proof of actual facts, with present data for a rational estimate of their amount; and, when this is made to appear, they may be recoverable.' " * * * "[T]he law is also well settled that damages may be recovered for loss of profits due to the breach of a contract if the evidence is sufficiently certain and definite to warrant the jury in estimating their extent." * * * "It has been said, however, that the amount of estimated loss of earnings (and the same would apply to loss of prospective profits) should, in the event of uncertainty, at least be supported by the best evidence available." * * *

* * * *

* * * "Where computation of damages is made uncertain by the nature of the breach of contract, '[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.' * * * [.]" [Citations omitted.]

Similarly, in *Coach House of Ward Parkway v. Ward Parkway Shops*, 471 S.W.2d 464, 472-73 (Mo. 1971), the Court stated:

Defendant relies on a line of cases exemplified by Coonis v. Rogers, Mo., 429 S.W.2d 709, and Anderson v. Abernathy, Mo., 339 S.W.2d 817, for the general proposition of law to the effect that recovery of anticipated profits of a commercial business are too remote, speculative to warrant recovery except where they are made reasonably certain by proof of actual facts with present data for a rational estimate of their amount. This is and has been the rule in Missouri. However, in Hargis v. Sample, Mo., 306

> S.W.2d 564, 569, also cited by defendant, this court in speaking of the certainty with which loss of profits must be shown said: "True, in some cases all that can be required is to produce all the relevant facts tending to show the extent of damage and one is not to be excused for a breach of contract resulting in damages simply because those damages may not be established with exact certainty. Wright v. Ickenroth, Mo. App., 215 S.W.2d 43, 45. It has been said, however, that the amount of estimated loss of earnings (and the same would apply to loss of prospective profits) should, in the event of uncertainty, at least be supported by the best evidence available. Moss v. Mindlin's, Inc., Mo., 301 S.W.2d 761, 773."
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> We believe this case comes within [this] rule * * * where if the breach exists, the experience of mankind is convincing that a pecuniary loss has occurred while at the same time the exact amount of damage is not susceptible of being ascertained with certainty.

The Court in *Coach House* then held that damages for lost profits could be recovered, on remand, on the basis of the testimony of an expert witness on the estimated loss of business due to the violation at issue.

We think this is the type of case where the damage award was based on the best evidence available, and where the estimate of loss is reasonable and thus is not too speculative under Missouri law. In sum, we hold that Central has sufficiently proved that it suffered damage to a protectable interest under the federal antitrust law and the State of Missouri's law on tortious interference with a business expectancy.

2. *Measure of Damages.*

TCI contends that Central's damage theory was "irrational" and overcompensatory because it allegedly failed to deduct all the "start-up" costs of the business. Central's theory was that it should receive the fair market value of the lost franchise, and this value was ascertainable through use of an

"industry rule of thumb"—ten times cash flow in Central's proposed third year of operations. Central cites controlling authority that the fair market value of a business has long been a recognized measure of damages for a precluded plaintiff in antitrust cases, *see, e.g. Arnott v. American Oil Co.*, 609 F.2d 873, 887 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980); *Albrecht v. Herald*, 452 F.2d 124 (8th Cir. 1971). *See also Affiliated Capital Corp. v. City of Houston*, 519 F. Supp. 991, 1011 (S.D. Tex. 1981), *rev'd on other grounds*, 735 F.2d 1555 (5th Cir. 1984). Central also cites to *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 148 (3d Cir.), *cert. denied*, ____ U.S. ____, 105 S. Ct. 564 (1984) where the Court approved the use of an industry rule of thumb—a multiplier times vested renewal income—to determine fair market value.

Central introduced a detailed damages study and extensive supporting testimony. The jury arrived at an actual damage amount of $10.8 million. Central points out that TCI itself suggested that the fair market value of the Jefferson City cable franchise was between $7.7 and $15 million. Although the damage award is large, we have concluded that we are obligated under controlling authority and the facts of the case to affirm. First of all, the Supreme Court has repeatedly made clear that once the fact of damage is established, the amount of damages requires a lesser degree of proof. *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 565-67 (1981) ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury. * * * The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.") For example, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969), the Court held that antitrust damages could be awarded on the basis of plaintiff's estimates of sales it could have made absent the violation:

> [D]amage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is

> available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact-finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

A respected commentator has summarized the law on the measure of antitrust damages as follows:

> The amount of damages may be established by evidence of facts from which some calculation may be logically and legally inferred. If the inference upon which the award is based is reasonable, the plaintiff may recover a sum in damages even if it is merely an approximation.

10 Von Kalinowski § 115.02[2] (1968) (footnotes omitted). Similarly, the United States Court of Appeals for the Seventh Circuit has recently reiterated, in a decision affirmed by the Supreme Court: "Because a plaintiff can seldom prove the exact amount of antitrust damages, he may sustain his burden with circumstantial evidence and estimates of damages based on reasonable assumptions." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1242 (7th Cir. 1982), *aff'd in part, rev'd in part on other grounds*, 465 U.S. 752, 104 S. Ct. 1464 (1984). The law of the State of Missouri is similar with respect to damages for tortious interference with business expectancy. *See, e.g., Budget Rent-A-Car*, 619 S.W.2d at 836-37.

Central presented an estimate of damages based on reasonable industry assumptions, and the jury was entitled to infer from the evidence actual damages in an amount of $10.8 million. Our review of the award fails to reveal any error,[19] and

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[19] TCI contends, in an argument not raised before the jury, that Central's damage estimate failed to adequately account for Central's start-up costs. However, our review of the damages study reveals that start-up costs of $1.6 million were accounted for. If TCI believed this figure understated start-up costs, it should have introduced evidence on this. Given that TCI failed to raise this argument before the jury, and that there is no evidence to suggest that Central's estimate is

we could reduce the award only by acting as the *de novo* fact-finder. This we may not do.

Perhaps most significantly, Central's damage study and its expert's testimony was admitted without objection. TCI failed to introduce evidence on damages, and did not argue damages in its final argument before the jury. It is apparent that TCI made a conscious decision to "go for broke," claiming that Central could simply not receive any damages at all because TCI was not liable. The jury rejected this argument and was forced to base its damage award on the evidence before it. TCI first objected to the damages award and its method of calculation in its post-trial motion. This was too late. Accordingly, the actual damages award of $10.8 million on the antitrust (before mandatory trebling) and tortious interference claims is affirmed.

The jury also awarded $25 million in punitive damages on the tortious interference claim. TCI does not challenge this award on appeal other than contending that if the actual damages award is reversed, the punitive damages award must also be reversed. Accordingly, although the punitive damages award is large, the award was based on a jury instruction on punitive damages which was not objected to at trial or on appeal and which, in any event, accurately set forth the law of the State of Missouri. The record reveals substantial evidence of intentional tortious conduct on which the punitive damages award was based. Accordingly, we affirm the jury's award.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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unreasonable, we assume that $1.6 million in estimated start-up costs is reasonable.

TCI also suggests in passing that Central's damages' theory erroneously uses its third year of operations as the base for determining fair market value. However, TCI failed to object to this method at trial. Moreover, the third year coincided with the date of trial, and thus had a reasonable basis.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* *vs.* TCI CABLEVISION, INC., *et al.*, *Defendants.*	[FILE STAMP] No. 83-4068-CV-C-5

ORDER

Pending before the Court are the following post-trial motions: (1) defendants' motion for judgment *non obstante veredicto;* (2) defendants' alternative motion for a new trial; (3) defendants' motion for clarification of the judgment; (4) plaintiff's motion for enhancement of its attorney's fees; and (5) defendants' motion for a stay of execution pending appeal. For the reasons set forth below, the Court will make the following rulings: (1) defendants' motion for j.n.o.v., alternative motion for a new trial, and motion for a stay of execution will be overruled; (2) defendants' motion for clarification will be sustained and the judgment in this case will be amended to preclude the possibility of double recovery by plaintiff; and (3) plaintiff's motion for enhancement of its attorney's fees will be overruled.

I. BACKGROUND

On January 22, 1985, the jury returned verdicts against defendants of $10,800,000.00 on each of plaintiff's antitrust

claims,[1] and $10,800,000.00 for actual damages and $25,000,000.00 for punitive damages on plaintiff's state law claim for tortious interference with a business expectancy.[2] These verdicts were rendered by an extremely attentive jury at the conclusion of a thirty-one day trial.

Plaintiff's claims arose out of a dispute over cable television franchise rights in Jefferson City, Missouri.[3] In 1978, defendants[4] (hereinafter collectively referred to as "TCI") bought the only existing cable television franchise[5] in Jefferson

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[1] Plaintiff successfully submitted two antitrust claims to the jury: actual monopolization and conspiracy to unreasonably restrain trade. The $10,800,000.00 award is the amount of the verdict before trebling.

[2] Plaintiff concedes that it cannot recover both treble damages on its antitrust claims and punitive damages on its tortious interference claim. *See Superturf, Inc. v. Monsanto Co.* 660 F.2d 1275, 1283-84 (8th Cir. 1981); *see also* page [68a] *infra.*

[3] Jefferson City provides a very attractive market for cable television. Because the city is nestled in a hilly region on the south bank of the Missouri River, broadcast television reception is extremely poor. Only one broadcast television station is located in the city. As a result of these factors, cable television's market penetration has been extremely high in Jefferson City.

[4] There were three defendants in this case: TCI Cablevision, Inc.; Community Telecommunications, Inc.; and Telecommunications, Inc. TCI Cablevision and Community Telecommunications are wholly-owned subsidiaries of Telecommunications, Inc. According to the evidence in this case, the parent corporation controls approximately 1,000 local cable systems and is the largest cable television company in the United States. The evidence also showed that the corporate organization of the three defendants was extremely loose. Employees authorized to act on behalf of one of the companies in reality acted on behalf of all three companies. Consequently, the jury was instructed to treat all three defendants as one entity for the purpose of returning its verdicts.

[5] A "franchise" is the term commonly used to describe the license issued by a local governmental entity to a cable television operator to build and maintain a cable system in the community. The original purpose of licensing cable systems stemmed from the fact that a cable operation, like any other public utility, needs easements across both public and private property in order to gain access to individual households. Thus, in the interest of preserving the integrity of the public domain, a licensing or franchising process developed whereby a city could demand assurances of responsible behavior from a prospective cable operator.

City. By its terms, the franchise which TCI purchased was scheduled to expire in April, 1981.

As is customarily done in cities across the country, Jefferson City initiated an RFP[6] process to solicit bids to determine the recipient of the next cable television franchise. Being the incumbent operator, defendants naturally enjoyed the inside track in the competition for the next franchise. Nevertheless, city officials remained open to the option of refusing to renew TCI's franchise, particularly in view of mounting consumer dissatisfaction with existing service.

In 1980, a group of local investors formed the plaintiff company (hereinafter referred to as "Central") for the express purpose of competing for a cable television franchise in Jefferson City. Aware of the public's dissatisfaction with the incumbent operator, Central began arranging financing and responded to the city's RFP by offering expanded services for less money. In contrast, defendants refused to participate directly in the RFP process. Instead, TCI undertook various tactics designed to ensure that it could not be displaced as the sole cable television franchisee in Jefferson City. Many of these activities were performed by Paul Alden, a "troubleshooter" in defendants' franchise renewal department. For example, Mr. Alden threatened to destroy the career of Elmer Smalling, a consultant who was evaluating the RFP responses for the city. Mr. Alden also attempted to intimidate city officials by threatening to flood the Jefferson City market with satellite dishes if defendants' franchise was not renewed. This threat, as it turned out, was a complete fraud: Mr. Alden represented that his company had exclusive control over the distribution of satellite dishes in the Jefferson City area when, in fact, his company had never participated in the satellite dish business. In addition, TCI sent shock waves through the Jefferson City community by announcing to the public that all cable television services would be terminated unless its franchise was renewed. Defendants

[6] The term "RFP" is shorthand for "Request for Proposals." An RFP is, in essence, an advertisement for bids. In its RFP, the city sets forth the minimum terms and specifications for a cable television system which all prospective operators are expected to meet.

applied additional pressure on city officials by refusing to pay the city approximately $60,000.00 in past-due franchise fees unless and until their franchise was renewed. Finally, on March 16, 1981, defendants filed a multi-count lawsuit against the city and began to engage the city in protracted litigation. The gravamen of this lawsuit was the claim that the First Amendment prohibited the city from terminating an entrenched cable television operator's right to provide cable services in the community.

Notwithstanding TCI's efforts to subvert the RFP process and retain its entrenched position, city officials continued to review the bids submitted by plaintiff and other applicants. The chief competitors in the RFP process were Central and Teltran, a cable television operator based in Columbia, Missouri. The city's consultant, Elmer Smalling, rated Central and Teltran equally. In November, 1981, however, Teltran withdrew its application, thus leaving plaintiff as the best candidate for a new franchise. On January 25, 1982, the city council of Jefferson City passed an ordinance authorizing the city attorney to begin negotiating franchise documents with plaintiff. While these negotiations were being conducted, defendants continued pressuring the city to renew its franchise.

On April 16, 1982, after a series of secret meetings between TCI and various city officials, Mayor Hartsfield announced that an agreement had been reached whereby the city would renew defendants' franchise and defendants would dismiss their lawsuit against the city. Nevertheless, on April 20, 1982, the city council voted by a 7-3 majority to award a non-exclusive franchise to plaintiff. Mayor Hartsfield promptly vetoed the ordinance granting a franchise to plaintiff. The next item on the council's agenda was a proposed ordinance which would renew defendants' franchise. The council was deadlocked at a 5-5 vote. The mayor cast the tie-breaking vote and, as a result, TCI retained its position as the only cable television operator in Jefferson City.

Contending that it had been wrongfully deprived of a franchise, Central brought the instant lawsuit. TCI counterclaimed. After thirty-one days of trial, the Court granted

plaintiff's motion for a directed verdict on defendants' counterclaims. Central submitted its case to the jury on three theories: (1) conspiracy to unreasonably restrain trade; (2) actual monopolization; and (3) tortious interference with a business expectancy. The jury found for plaintiff under each theory. The post-trial motions presently before the court ensued.

II. MOTION FOR J.N.O.V.

TCI's motion for j.n.o.v. advances two primary arguments for overturning the jury's verdicts. Only these two arguments will be addressed herein; the other grounds raised by defendants are rejected as being without merit.

A. Noerr-Pennington Defense

The first substantial argument raised by defendants is that all of their allegedly wrongful conduct was protected activity within the purview of the *Noerr-Pennington* doctrine. There are two distinct components of the *Noerr-Pennington* doctrine, both of which are based on the notion that civil liability should not be imposed on persons for exercising their First Amendment right to petition the government.[7] The first prong of the *Noerr-Pennington* defense is the protection of legitimate efforts to lobby or influence public officials with respect to political action, even if those efforts are designed to eliminate competition.[8] The second strand of the *Noerr-Pennington* defense is

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[7] Although the *Noerr-Pennington* defense is most often asserted against antitrust claims, it is equally applicable to many types of claims which seek to assign liability on the basis of the defendant's exercise of its First Amendment rights. *See In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1312 (8th Cir. 1985); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 747 (8th Cir. 1982); *First National Bank v. Marquette National Bank*, 482 F. Supp. 514, 524-25 (D. Minn. 1979), *aff'd*, 636 F.2d 195 (8th Cir. 1980), *cert. denied*, 450 U.S. 1042 (1981).

[8] *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961); *see, e.g., First Am. Title Co. of S. Dakota v. South Dakota Land Title Ass'n*, 714 F.2d 1439, 1445-47 (8th Cir. 1983), *cert. denied*, 104 S.Ct. 709 (1984); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d at 745-46; *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1195 (8th Cir. 1982); *see generally* Annot., 71 A.L.R. Fed 723 (1985).

the protection of genuine efforts to seek redress through the judicial process, even if the outcome of such litigation is certain to affect or eliminate competition.[9] Both the lobbying and litigation aspects of the *Noerr-Pennington* doctrine are implicated in the instant case.

1. *Litigation*

Under the *Noerr-Pennington* doctrine, participation in the judicial process cannot be asserted as a basis for civil antitrust liability "unless it may be characterized as a sham cover for what is really just an attempt to directly interfere with the business relations of a competitor."[10] The fundamental question underlying the issue of whether a lawsuit was a mere sham and thus unprotected conduct is one of intent.[11] In the instant case, plaintiff introduced evidence concerning defendants' 1981 lawsuit against Jefferson City wherein defendant had sought to enjoin the city from displacing it as a cable television operator. At first, plaintiff attempted to show that this lawsuit fell within the sham exception to the *Noerr-Pennington* doctrine.[12] As the trial progressed, however, plaintiff apparently had doubts about the sufficiency of the evidence to support a finding that the 1981 lawsuit was a sham and, consequently, withdrew the issue from the jury's consideration. The withdrawal instruction expressly directed the jury that it could not consider defendants' 1981 lawsuit against Jefferson City to have been unlawful conduct. This withdrawal instruction adequately informed the jury that defendants' 1981 lawsuit was protected litigation under the

[9] *California Motor Transport Co. v Trucking Unlimited*, 404 U.S. 508, 510-511 (1972); *see, e.g., First Am. Title Co. of S. Dakota v. South Dakota Land Title Ass'n*, 714 F.2d at 1448; *Alexander v. National Farmers Org.*, 687 F.2d at 1200.

[10] *Alexander v. National Farmers Org.*, 687 F.2d at 1200; *see generally Razorback Ready Mix Concrete Co. v. Weaver*, No. 84-1325, slip op. at 4-7 (8th Cir. May 8, 1985).

[11] *See Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 297 (8th Cir. 1978).

[12] *Cf. Alexander v. National Farmers Org.*, 687 F.2d at 1200-04 (litigation designed to harass and intimidate third parties in order to directly interfere with business relations of plaintiff held a mere sham).

Noerr-Pennington doctrine.[13] It must be assumed that the jury followed the Court's instructions and did not rely on the 1981 lawsuit in arriving at its verdicts. Defendants' arguments to the contrary[14] are contradicted by the plain language of the jury instructions.

2. *Lobbying*

As noted above, the lobbying prong of the *Noerr-Pennington* doctrine extends a cloak of immunity from civil liability to legitimate efforts to influence public officials with respect to political action.[15] It bears emphasis, however, that only *legitimate* lobbying efforts are protected; conduct that extends beyond "traditional political activity" may not be protected.[16] Thus, when accompanied by illegal or fraudulent actions, efforts to influence public officials are not exempt under the *Noerr-Pennington* doctrine.[17]

In the instant case, defendants contend that the jury's verdicts should be overturned because all of their allegedly anti-competitive conduct was protected activity within the *Noerr-Pennington* doctrine. The Court must disagree. The record clearly contained sufficient evidence to support the jury's finding that the wrongful conduct of defendants was either "sham lobbying" or not lobbying at all. For example, Paul Alden's threat to ruin the career of Elmer Smalling simply cannot be characterized as "lobbying" in the first instance. Smalling was not an elected public official, nor did his role in

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[13] Even though a lawsuit is "exempt conduct" under the *Noerr-Pennington* doctrine, it nevertheless may be considered "to the extent it tends to show the purpose or character of other, nonexempt activity." *Alexander v. National Farmers Org.*, 687 F.2d at 1196. The jury was so instructed in the instant case. *See* Instruction No. 15.

[14] *See* Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, For a New Trial, at pp. 10-11.

[15] *See* note 8 *supra; see also Affiliated Capital Corp. v. City of Houston*, 735 F.2d 1555, 1566-68 (5th Cir. 1984); *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173, 1180-81 (8th Cir. 1982).

[16] *Westborough Mall v. City of Cape Girardeau*, 693 F.2d at 746.

[17] *Id.*

the city's RFP process involve political action; instead, he was merely a consultant to the city whose job was to evaluate a mass of technical information. In addition, the jury clearly was justified in believing that Paul Alden's threat to flood the Jefferson City market with satellite dishes was not legitimate lobbying activity; instead, it was pure fraud. As Alden admitted during his deposition, he knew that neither he nor his former employer had ever been in the satellite dish business. Finally, TCI's refusal to pay past-due franchise fees to the city unless the city renewed its franchise had nothing to do with "genuine" political activity; instead, it was nothing short of commercial blackmail. Although there was conflicting evidence on the issue, the jury's determination that TCI had strayed beyond the bounds of legitimate lobbying activity is well-supported by the record. Accordingly, defendants' contention that all of its conduct was protected by the *Noerr-Pennington* doctrine must be rejected.

B. First Amendment Defense

The second frontal assault on the verdict is the argument that defendants cannot be held liable for retaining their position in the Jefferson City cable television market because the First Amendment afforded them an absolute right to continue their cable television operation free from government interference. Defendants claim that they are entitled to First Amendment protection because their sole function is to transmit information to the public. While defendants admit that they do not produce original programming, they contend that their role as a conduit for news, entertainment, and advertising is analogous to that of *Reader's Digest*.

Although it doubts that TCI's First Amendment rights are coextensive with those of the print media,[18] this Court acknowledges that cable television operators are entitled to *some* measure of First Amendment protection. For example, govern-

[18] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 128 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1377-80 (10th Cir. 1981); *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. 976, 985 (D.R.I. 1983).

mental entities may not discriminate against a cable television operator on the basis of programming content.[19] Nor may a local governmental body artificially limit the number of cable television operators in a given market.[20] Nevertheless, it has long been the law that the First Amendment does not afford absolute immunity from antitrust liability to members of the communications industry.[21] Thus, if one cable television operator conspires or engages in predatory conduct for the purpose of eliminating its competitors, it will be liable in an antitrust lawsuit to the same extent as any other competitor in any other industry.

In essence, defendants' First Amendment argument is that they were justified, as a matter of law, in resisting Jefferson City's RFP process because the city could not constitutionally force an established cable television franchisee to cease operation at the conclusion of the franchise term.[22] Defendants further contend that, even if the Jefferson City market could support only one cable system, the city could not constitutionally displace the incumbent franchisee with a new franchisee; instead, defendants argue, they had an absolute First Amendment right to continue their operation either with or without a franchise from the city.[23] Thus, defendants'

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[19] *See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 (9th Cir. 1985); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127; *Community Communications Co. v. City of Boulder*, 660 F.2d at 1376; *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979).

[20] *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1336-38 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1411.

[21] *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945).

[22] *Cf. Carlson v. Village of Union City*, 601 F. Supp. 801, 809-12 (W.D. Mo. Mich. 1985) (dismissing First Amendment claim of cable television operator whose franchise had been revoked by local governmental entity).

[23] The inescapably ironic spectre implicit in this argument is that a cable system—such as TCI's system in Jefferson City—which was allowed to expand and prosper for years under the protective mantle of an exclusive franchise can now use the First Amendment as a shield to ward off competition and maintain its entrenched position.

position is that Jefferson City's RFP process was illegal as a matter of federal constitutional law and that, consequently, all of TCI's efforts to retain its place in the Jefferson City cable television market were lawful.[24]

If the Court agreed with defendants' argument in its entirety, plaintiff's complaint would have been dismissed a long time ago. However, defendants' argument misstates the applicable law and misperceives the theory of the case that was submitted to the jury.

1. *The First Amendment and Cable Television*

There are two primary areas of interface between cable television and the First Amendment. First, there is the matter of governmental regulation of programming content. It is well-settled that, absent some compelling governmental interest, such content regulation is impermissible.[25] This aspect of the First Amendment was not implicated in the instant case; there was simply no evidence that Jefferson City engaged in content-based regulation.

The second area of interface between cable television and the First Amendment surrounds the franchising process whereby local governmental entities regulate access to cable television

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[24] In support of its position, TCI draws an analogy to the print media: just as the government has no authority to dictate who may or may not run the sole newspaper in a community, *see Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254-58 (1974), TCI insists that a city may not decide who may operate the sole cable television system in a given market. As will be discussed *infra*, there are two fundamental flaws in defendants' argument: (1) the law applicable to cable television differs from the law applicable to print media in that, to the extent that a given market can support only one cable system, a city does have the authority to select the best applicant for a *de facto* exclusive franchise; and (2) regardless of whether or not a market can support more than one system, a cable operator cannot use the First Amendment as a shield when it engages in anticompetitive and predatory conduct for the purpose of maintaining its monopoly power over the market.

[25] *E.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Videophile, Inc. v. City of Hattiesburg*, 601 F. Supp. 552 (S.D. Miss. 1985).

markets. This area has provided fertile ground for litigation in recent years.[26] The only legal principle on which virtually all courts have agreed is that local governmental entities have *some* authority to regulate television operators in the interest of minimizing the inevitable disruption of the public domain occasioned by the installation of cable television systems.[27] In addition, it is noteworthy that federal law has acknowledged the authority of a local governing body to "award one or more franchises within its jurisdiction."[28] Thus, it appears safe to say that cities, such as Jefferson City, enjoy the power to license cable television operators within their geographic spheres of influence.

A more difficult problem arises, however, when a local governmental entity seeks to place a limit of the number of franchisees in its jurisdiction. Although the law in this area is far from settled, the emerging answer appears to be that the grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation.[29] The theory is that,

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[26] *See, e.g., Tele-Communications of Key West, Inc. v. United States*, 757 F.2d at 1335-39; *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1401-11; *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125-29; *Community Communications, Inc. v. City of Boulder*, 660 F.2d at 1375-80; *Carlson v. Village of Union City*, 601 F. Supp. at 809-812; *Century Federal, Inc. v. City of Palo Alto*, 579 F. Supp. 1553, 1561-65 (N.D. Cal. 1984); *Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543, 547 (W.D. Ky. 1982).

[27] *E.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1406; *see also Community Communications, Inc. v. City of Boulder*, 660 F.2d at 1377-78 ("[s]ome form of permission from the government must, by necessity, precede such disruptive use of the public domain").

[28] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 621(a)(1) (1984); *see also id.* § 621(b)(1) (prohibiting operation of cable television system without a franchise); H. R. Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S. Code Cong. & Ad. News 4655, 4696 (Cable Communications Policy Act of 1984 "grants to the franchising authority the discretion to determine the number of cable operators to be authorized to provide service in a particular geographic area").

[29] *See Tele-Communications of Key West, Inc. v. United States*, 757 F.2d at 1338; *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127; *Community Communications, Inc. v. City of Boulder*,

where physical and economic factors render a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one operator can survive in the market, it makes sense to allow the local government to choose the best applicant.[30] Otherwise, as a result of the enormous start-up costs of constructing a cable television system,[31] no one would dare compete in a natural monopoly-type market with an incumbent operator even if the incumbent was providing poor service to the consuming public. The initial investment would be too great to risk on the hope of wresting the entire market away from the incumbent. Thus, the incumbent operator would remain in a firmly entrenched position regardless of the quality of its system. Consequently, in a natural monopoly situation, the First Amendment should tolerate a franchising process whereby a city may periodically award an exclusive franchise to the applicant which offers the best package to the public.[32]

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660 F.2d at 1378-80. *But cf. Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d at 1404-05. A "natural monopoly" situation exists where "a market has room for only one firm." *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125; *see generally Byars v. Bluff City News Co.*, 609 F.2d 843, 853 n. 27 (6th Cir. 1979).

[30] Allowing local governmental entities to select the most qualified applicant is the most logical allocation of authority for two reasons. First, because cable systems can operate profitably only in areas of relatively high population density, each system typically serves only one community. It would be extremely unusual for a cable system to serve the rural area situated between two towns. Consequently, the local governing body is not too small to handle the job of regulating cable operators. Second, the local governing body is not too big for the job. In contrast to a state or federal regulatory body, which likely would respond to the idiosyncrasies of a particular community with bureaucratic insensitivity, local governmental entities are ideally sized to meet the needs of their constituents.

[31] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 126; *Berkshire Cablevision of Rhode Island v. Burke*, 571 F. Supp. at 986.

[32] Such a scheme acknowledges that a local governmental entity is not a competitor of cable operators, but "a representative of the potential customers of these companies." *Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125-26. Although TCI insists that the First Amendment was designed to allow each individual customer

On the other hand, if a given cable television market does not have natural monopoly characteristics, the justification for limiting the number of franchisees disappears. If the market can support more than one cable system, it no longer makes sense to force prospective operators to compete for a single franchise. Nor does it make sense to allow the local governmental body to act as the guardian of the public's interest. Instead, the surest method of determining which operator best fulfills the needs of each consumer is to grant licenses to all qualified applicants and to let them compete in the marketplace.

In a nutshell, then, the determinative factor with respect to a city's power to restrict the number of cable television franchisees is whether economic and physical conditions in the relevant market give rise to a "natural monopoly" situation. If the market has room for only one firm, it makes sense to require all prospective franchisees to compete "for" the market and to allow the local governing body to make the decision as to which cable system will best serve its constituents. But, if a market has room for more than one cable system, a city's efforts to artificially limit the number of operators would constitute a prior restraint in violation of the First Amendment.

2. *The Theories of the Case*

In order to obviate TCI's First Amendment concerns, the jury instructions in this case were carefully tailored to ensure that the jury could not return a verdict for plaintiff under

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to choose which cable system to subscribe to, TCI's concern for the rights of consumers rings hollow. In a natural monopoly-type market, individual consumers have no choice among competing systems. Thus, the franchising process actually enhances the power of consumers by allowing a local governing body to engage in a form of collective bargaining with franchise applicants. Through the franchising process, consumers realize two principal advantages. First, the franchise agreement imposes certain obligations on the cable operator which must be performed upon penalty of termination. *See Carlson v. Village of Union City*, 601 F. Supp. at 812. Second, the fact that a franchise has an expiration date gives the franchisee incentive to provide good service or risk losing its bid for renewal. Otherwise, as the evidence showed in the instant case, the incumbent operator is prone to become lackadaisical.

circumstances where defendants had a valid First Amendment defense to plaintiff's claims. As stated in Instruction No. 20, plaintiff submitted its case under two divergent theories. First, the jurors were instructed that if they found that physical and economic conditions in the Jefferson City cable television market gave rise to a natural monopoly, they must focus on whether defendants engaged in anti-competitive or predatory conduct with respect to competition *for* the market. Second, the jurors were instructed that if they found that a natural monopoly situation did not exist as of April, 1982, they must focus on whether defendant engaged in anti-competitive or predatory conduct with respect to competition *in* the market. Assuming that the jury heeded this "fork-in-the-road" instruction as well as all other instructions, it is apparent that all questions of fact underlying defendants' First Amendment argument were considered and resolved by the jury.[33]

(a) *Natural Monopoly Theory*

Under the "fork-in-the-road" jury instruction described above, the jury was permitted to consider whether market conditions gave rise to a natural monopoly situation. If it found that a natural monopoly situation existed, the jury was further instructed to determine whether defendants committed the offense of actual monopolization with respect to competition *for* the market. In other words, under this submission the jury was told to consider whether defendants violated the antitrust laws with respect to competition *for* the exclusive right to serve the Jefferson City market.[34]

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[33] According to the Court's research, this is the first case in which the question of whether a natural monopoly situation exists with respect to a cable television market has been submitted to a jury. *Cf. Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 125-28; *Carlson v. Village of Union City*, 601 F. Supp. at 810 n. 8. The Court is convinced that treating the natural monopoly issue as a question of fact was proper; in each case, the issue will turn on a variety of particularized factors ranging from the population density of a given community to the age and height of its utility poles.

[34] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127.

This submission is not objectionable on First Amendment grounds. As noted above, a local governmental entity has the authority to select an exclusive franchisee when: (1) the local market has room for only one cable television system; and (2) the governing body makes its selection in the public interest.[35] If it proceeded under this branch of the "fork-in-the-road" instruction, the jury necessarily would have found that the Jefferson City market had room for only one cable system. Moreover, to ensure that the jury focused on "the public interest" as the standard by which the city awarded the franchise, the Court specifically instructed the jury that anti-competitive or predatory activity is conduct which operates to the detriment of purchasers or consumers. Thus, in order to return a plaintiff's verdict under this theory, the jury necessarily would have made two factual findings: (1) that the Jefferson City cable television market could only support one franchisee; and (2) that, in retaining their position as the sole franchisee in the Jefferson City market, defendants acted to the detriment of the interests of the consuming public. Given these two factual determinations, plaintiff's "natural monopoly" theory of the case easily withstands defendants' First Amendment attack.

(b) *Open Market Theory*

TCI's First Amendment assault on plaintiff's "open market" theory of the case is more difficult to analyze. Under the second branch of the "fork-in-the-road" instruction described above, the jury was permitted to find that the Jefferson City market had room for more than one cable television franchise. If it found that the market had room for more than one franchise, the jury was further instructed to determine whether defendants committed the offense of actual monopolization with respect to competition *in* the market. In other words, under this submission the jury was told to focus not on competition between rival cable television operators for a single franchise, but on head-to-head competition in the marketplace. This instruction effectively warned the jury that, notwithstand-

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[35] *See* notes 26-32 and accompanying text *supra*.

ing the city's intention to award only one franchise, it could not assume that only one franchise should have been awarded. At all times, it was within the province of the jury to determine whether the physical and economic characteristics of the Jefferson City market permitted head-to-head competition.

Defendants insist that plaintiff should not be allowed to recover under its "open market" theory for two reasons. First, defendants argue that, once the jury determined that Jefferson City had room for more than one cable system, the city's RFP process was illegal as a matter of law. Second, defendants contend that the evidence of plaintiff's unwillingness to compete head-to-head in the marketplace was so overwhelming as to preclude recovery under an "open market" theory.

Despite the superficial appeal of these two arguments, neither can withstand close scrutiny. It is true that TCI's publicly stated position in Jefferson City and at trial was that they were willing to compete head-to-head with any competitor. In accordance with this public posture, defendants characterized the city's RFP process as an illegal auction for an exclusive franchise and refused to participate in the RFP. In addition, defendants filed suit against the city in 1981, claiming that any attempt to revoke or terminate its right to provide cable television programming would be violative of the First Amendment. Thus, on the surface, defendants' contention that it was at all relevant times a scrupulous proponent, not an opponent, of open market competition appears to be true.

On closer inspection, however, it becomes apparent that the sincerity of TCI's publicly announced position was subject to legitimate dispute. At trial, there was evidence that defendants had taken a contrary position by defending a city's right to grant an exclusive franchise in other communities. In addition, notwithstanding defendants' criticism of plaintiff's efforts to obtain a *de facto* exclusive franchise from the city, there was substantial evidence that defendants were engaged in a calculated scheme to prevent plaintiff from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves.

Two factual findings implicit in the jury's verdicts confirm that TCI's endorsement of head-to-head competition lacked sincerity. First, the jury's finding that defendants possessed monopoly power — that is, the power to exclude competition in the Jefferson City market — contradicts TCI's argument that the city was solely responsible for deciding who could operate a cable system within that jurisdiction.[36] Second, the jury's finding that "defendants caused Jefferson City to terminate the business expectancy of plaintiff"[37] directly contradicts defendants' argument that they were not responsible for keeping plaintiff out of the Jefferson City cable television market. Undisputed evidence showed that, on April 20, 1982, the city council voted to grant an ostensibly nonexclusive franchise to plaintiff. If defendants were truly sincere about competing head-to-head with plaintiff in market, there was no need for them to cause the Mayor of Jefferson City to veto plaintiff's franchise. All that defendants needed to do was to press for a nonexclusive franchise of their own. Yet, the jury specifically found that TCI *caused* the city to withhold a franchise from plaintiff. Thus, even under an "open market" theory, there clearly was sufficient evidence to support the conclusion that defendants violated the antitrust laws by effectively barring plaintiff from the Jefferson City cable television market.

In sum, it was never necessary for the jury to frontally consider defendants' "First Amendment defense." If the jury had found that the city was solely responsible for artificially limiting the number of franchisees in the Jefferson City market, then *a fortiori* it would have found neither that defendants possessed monopoly power nor that defendants caused the city to veto plaintiff's franchise. Conversely, since the jury found

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[36] The verdict director on plaintiff's actual monopolization claim, Instruction No. 22, required as its second element that "defendants possessed or acquired monopoly power over the Jefferson City cable television services market." In turn, Instruction No. 18 defined "monopoly power" as "the power to exclude competition or control prices in the relevant product market or product sub-market."

[37] Instruction No. 23 (verdict director on plaintiff's tortious interference claim).

that defendants possessed monopoly power and that defendants caused the city to veto plaintiff's franchise, the Court is compelled to conclude that defendants' "First Amendment defense" is nothing more than a red herring. Simply stated, the jury could not have returned its verdict for plaintiff under an "open market" theory *unless it specifically found that defendants engaged in anti-competitive and predatory conduct with respect to competition in the market.* Defendants had every opportunity to produce evidence and make arguments to convince the jury that plaintiff's exclusion from the Jefferson City market was the result of either the city's efforts to artificially limit the number of franchisees or the plaintiff's unwillingness to compete head-to-head with defendants in the market. Defendants also enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head-to-head competition in the marketplace. If the jury had been swayed by any of these arguments, it would not have found against defendants. In short, the true issue in this case was whether defendants were responsible for plaintiff's exclusion from the Jefferson City market. The jury's conclusion that defendants were the responsible parties completely undermines any attempt to pass the blame on to the city by way of an amorphous "First Amendment defense" in this case.

III. MOTION FOR A NEW TRIAL

In support of its motion for a new trial, TCI asserts myriad grounds for setting aside the jury's verdict. Only seven of the cited grounds will be addressed herein. The balance of the points raised by TCI must be rejected as being without merit.

A. Opening Statement

First, defendants attack the Court's refusal to allow them to make legal arguments concerning the scope of a cable television operator's First Amendment rights during opening statement. On more than one occasion, TCI's attorney attempted to interject gratuitous and inaccurate legal arguments concerning the First Amendment in his opening remarks.

Prompt objections by plaintiff's counsel were sustained.[38] The Court's rulings are not subject to serious dispute. Opening statements afford the parties an opportunity to outline what their evidence will be. Legal arguments offered during the course of an opening statement are improper. Accordingly, the Court had no choice but to direct defendants' attorney to refrain from making references to principles of constitutional jurisprudence during his opening statement, particularly where, as here, his characterization of the law was either erroneous or misleading.

B. Evidentiary Rulings

TCI's second argument in support of its prayer for a new trial consists of a challenge to various evidentiary rulings by the Court. First, defendants contend that the Court erred in excluding evidence concerning the "*Boulder* case." The Court stands by this ruling. During his examination of a number of witnesses, TCI's attorney attempted to elicit testimony concerning the effect on the instant case of various rulings by the federal district court, the court of appeals, and the United States Supreme Court in the course of litigation between a subsidiary of TCI and the City of Boulder, Colorado.[39] In each instance,

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[38] Defendants also complain that, in the course of sustaining one of plaintiff's objections, the Court stated that the First Amendment had "nothing to do with this case." If taken literally, this remark would have been incorrect; as noted above, the First Amendment was involved in this case by virtue of the *Noerr-Pennington* defense and in connection with the natural monopoly question. *See* pages [42a-55a] *supra.* Put in context, however, the true meaning of the Court's remark, as everyone present in the courtroom—including defendants' attorneys—was aware, was that any reference to the First Amendment had no place in an opening statement. Moreover, as the trial progressed, TCI was afforded every opportunity to educate the jury with respect to both its *Noerr-Pennington* defense and its claim that it did not act as a monopolist but instead acted as a zealous defender of the First Amendment. Thus, any overstatement by the Court during defendants' opening statement clearly did not taint the jury's verdict.

[39] *See Community Communications Co. v. City of Boulder,* 485 F. Supp. 1035 (D. Colo. 1980), *rev'd,* 630 F.2d 704 (10th Cir. 1981), *rev'd,* 455 U.S. 40 (1982); *Community Communications Co. v. City of Boulder,* 496 F. Supp. 823 (D. Colo. 1980), *rev'd,* 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed,* 456 U.S. 1001 (1982).

defendants' attorney attempted to characterize the *Boulder* case as a landmark establishing an absolute First Amendment right for cable television systems to operate free from local governmental regulation. Upon timely objections by plaintiff's counsel, this evidence was excluded for two basic reasons. First, TCI's characterization of the *Boulder* case was deliberately misleading. Of the three appellate decisions in the *Boulder* litigation, only one[40] contained any substantive discussion of the First Amendment implications of local governmental cable regulations, and that opinion does not merit characterization as a landmark decision establishing an absolute First Amendment right to operate a cable television system.[41] Second, the Court was concerned that any probative value to be derived from evidence concerning the *Boulder* case was easily outweighed by the potential risk of misdirection and confusion such an inquiry would entail. For example, when defendants offered to introduce a certified copy of a consent decree entered into by the city and the cable operator in the *Boulder* case, this offer was rejected on the ground that the jury might well misperceive the importance of such a document and give it undue weight.

Another evidentiary ruling challenged by TCI is the Court's exclusion of the expert testimony of Arthur Lee. Mr. Lee is a Vice President of Operations for TCI. Because Mr. Lee was never designated as an expert in response to plaintiff's interrogatory under Fed.R.Civ.P. 26(b)(4)(A)(i), plaintiff assumed that he would be used by defendants as a lay witness only. In the course of examining Mr. Lee at trial, defendant's counsel began asking the witness about the pole attachment and pole replacement costs that would be involved in building a brand new cable television system in Jefferson City. Plaintiff's objection to this testimony was sustained on the ground that this was a subject for expert testimony and that Mr. Lee had not

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[40] *See* 660 F.2d at 1375-80.

[41] To the contrary, the Tenth Circuit overturned a preliminary injunction in favor of the cable operator and remanded the case to the district court, stating that the scope of the cable operator's First Amendment protection was a matter to be developed at trial. *Id.* at 1380.

been designated as an expert. TCI seeks to overturn this ruling by characterizing Mr. Lee as an occurrence witness who merely would have testified "as to his personal knowledge as a veteran in the cable field."[42] Defendants' argument misses the point. Under Fed. R. Evid. 702, a witness may qualify as an expert by virtue of his knowledge, experience, or training. The crucial distinction between lay testimony and expert testimony is that the subject of expert testimony "must be so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman."[43] Viewed in this context, it is readily apparent that Mr. Lee's proffered testimony was expert testimony. According to defendants, the proffered testimony would have dealt with "make-ready costs, pole brackets and utility pole spacing."[44] These topics clearly are beyond the understanding of an ordinary layman. Indeed, defendants contend that Mr. Lee was qualified to give his opinion "based on his extensive experience in the industry and on his knowledge acquired as an executive officer of TCI Cablevision."[45] This statement is, in effect, an admission by TCI that Mr. Lee's testimony concerned a technical subject which only an expert, and not a layman, would not [sic] be qualified to address. Therefore, it was proper to exclude Mr. Lee's testimony by reason of defendants' failure to designate him as an expert witness in response to plaintiff's interrogatory under Fed.R.Civ.P. 26(b)(4)(A)(i).

A third evidentiary ruling challenged by TCI which merits discussion relates to the testimony of TCI's expert economist, Mr. Roy Weinstein. Before Mr. Weinstein began testifying, plaintiff's counsel moved to exclude his testimony in its entirety on the ground that he had been reading "daily copy" of the

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[42] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 38.

[43] *McCormick's Handbook on the Law of Evidence* § 13, at 29 (2d ed. 1972).

[44] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 39.

[45] *Id.*

trial transcript in violation of Fed.R.Evid. 615. Mr. Weinstein acknowledged that he had been reading "daily copy." Although it would have been justified in excluding all of Mr. Weinstein's testimony under these circumstances,[46] the Court took a middle position and ruled that Mr. Weinstein could testify concerning any information he had obtained and opinions he had formed before, but not after, he had been deposed by plaintiff in September, 1984. Defendants insist that this ruling was an abuse of discretion. The Court disagrees. Mr. Weinstein's review of daily copy was a clear violation of Fed. R. Evid. 615. If TCI had wanted to qualify Mr. Weinstein as a person whose presence was essential to the presentation of its case within the meaning of the rule, it should have so moved when the rule was invoked at the start of trial. Moreover, the Court believes that its ruling was correct under Fed. R. Civ. P. 26(e)(1)(B), which imposes an affirmative duty on parties to supplement their interrogatory answers concerning the substance of anticipated expert witness testimony; it bears emphasis that Mr. Weinstein was precluded only from testifying with respect to matters of substance which had arisen subsequent to his deposition in September, 1984. Accordingly, the Court stands by this ruling.

The final evidentiary point to be addressed herein concerns the testimony of Clarence Blume. Mr. Blume, a member of the Jefferson City City Council in the crucial period of 1981-82, was called to testify by plaintiff. As a result of his testimony, the Court for the first time became aware of how deeply involved TCI's lead attorney, Mr. Harold Farrow, had been in TCI's efforts to retain its franchise in Jefferson City. During Mr. Farrow's cross-examination of Mr. Blume, the attorney and the witness began debating over exactly what had transpired in Jefferson City. When Mr. Blume directed questions at Mr. Farrow, the attorney did not offer any objection or motion to strike the witness' "testimony" as being non-responsive. Instead, much to the Court's astonishment, Mr. Farrow appeared

[46] *See Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372-74 (5th Cir. 1981).

content to answer Mr. Blume's questions. At times, the witness and the attorney began arguing back and forth. On one occasion, the situation had deteriorated to the point where the Court intervened *sua sponte* and directed Mr. Blume to just answer the questions asked. All the while, Mr. Farrow did not object to nor move to strike Mr. Blume's testimony; it was obvious that Mr. Farrow believed he was "scoring points" with the jury. The following day — after having had an opportunity to confer with his associates and read the "daily copy" of the trial transcript — Mr. Farrow finally offered a motion to strike Mr. Blume's testimony in its entirety. This motion was denied as being untimely. Under Fed.R.Evid. 103(a)(1), a party ordinarily may not challenge a ruling admitting evidence unless he has made a timely motion to strike on the record. It bears emphasis that Mr. Farrow is not a novice attorney who was simply overwhelmed by a hostile witness; instead, it was quite evident that Mr. Farrow refrained from objecting to Mr. Blume's testimony because he perceived that he was creating a favorable impression in the minds of the jurors. In addition, the Court notes that the vast majority of Mr. Blume's testimony was not inadmissible in the first instance; thus, TCI's motion to strike *all* of the witness' testimony was overbroad. Under these circumstances, the Court is unwilling to set aside the contemporaneous objection rule. Accordingly, the Court stands by its decision to overrule defendants' motion to strike Mr. Blume's testimony.

C. Directed Verdict on Defendants' Counterclaim

Defendants' next argument in support of their request for a new trial is that the Court erred in granting plaintiff's motion for a directed verdict on defendants' counterclaims. TCI's position on this issue clearly lacks merit. At trial, defendants attempted to make a submissible case against plaintiff on the following theories: (1) conspiracy to unreasonably restrain trade; (2) attempt to monopolize; (3) conspiracy to violate TCI's constitutional rights; and (4) tortious interference with TCI's business relations. In attempting to prove their allegation of a secret conspiracy between plaintiff and a host of state and

local politicians, TCI repeatedly posed questions to the politician-witnesses to the effect of: "Isn't it true that you had a secret arrangement with plaintiff to drive TCI out of Jefferson City?" Without exception, TCI's pointed accusations were calmly denied. In short, there was absolutely no evidence of any kind of unholy arrangement between plaintiff and governmental officials. To the contrary, the evidence consistently showed that plaintiff at all times remained within legitimate lobbying channels in seeking a cable television franchise. After all of the evidence was in, it became apparent that the gravamen of TCI's counterclaims was that the RFP process initiated by the city was illegal and that plaintiff had somehow violated TCI's rights by participating in the RFP process. Assuming *arguendo*[47] that the RFP process was in fact illegal and that plaintiff did in fact violate defendants' rights by participating in the RFP process, plaintiff still could not be held liable for its conduct because of the *Noerr-Pennington* defense. As noted above,[48] the *Noerr-Pennington* doctrine affords a cloak of immunity from civil damages liability to legitimate efforts to lobby or influence public officials with respect to political action, even if those efforts are designed to eliminate competition. Here, all of plaintiff's allegedly wrongful conduct clearly falls within the purview of the *Noerr-Pennington* defense;[49] accordingly, it was proper to grant plaintiff's motion for a directed verdict on all of TCI's counterclaims.[50]

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[47] *Cf.* pages [45a-51a] *supra.*

[48] *See* page [44a] *supra.*

[49] *See Hopkinsville Cable TV, Inc. v. Pennyroyal Cablevision, Inc.*, 562 F. Supp. at 546-47; *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 228 (7th Cir. 1975); *see also First Am. Title Co. of S. Dakota v. South Dakota Land Title Ass'n*, 714 F.2d at 1445-47; *City of Kirkwood v. Union Electric Co.*, 671 F.2d at 1180-81; *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d at 293-297.

[50] As noted above, *see* note 7 *supra*, the *Noerr-Pennington* defense is applicable to many types of claims even though it is most commonly associated with antitrust claims. In particular, the *Noerr-Pennington* defense is available with respect to the types of claims asserted by TCI. *See Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980) (*Noerr-Pennington* doctrine applicable to § 1983 claims); *First National Bank of Omaha v. Marquette National Bank*, 482 F. Supp. at 521, 524-25 (*Noerr-Pennington* doctrine applicable to § 1983 and tortious interference claims).

D. Closing Argument

Defendants' fourth assignment of error in their motion for a new trial is that the Court did not allow their attorneys sufficient time to make a proper closing argument. At the close of all the evidence the Court conferred with the attorneys concerning the amount of time they desired to make their final appeal to the jury. Although the Court was inclined to allow only an hour per side, it acceded to plaintiff's request for ninety minutes per side. Counsel for TCI objected that this amount of time was grossly inadequate in view of the length and complexity of the trial. TCI's request for additional time was overruled. The Court stands by this ruling. There is no doubt but that ninety minutes was adequate time for each side to present its case to the jury. Although this trial was lengthy, it was not particularly complex. The fundamental issues for the jury were whether TCI kept plaintiff out of the Jefferson City cable television market and, if so, whether TCI accomplished that result by using illegitimate means. Unlike many antitrust cases, the instant lawsuit did not turn on technical documentary evidence and expert evidence; instead, the crucial evidence concerned overt conduct. Thus, it was not necessary to allow counsel a great amount of time to make the case understandable for the jury.

Moreover, the Court notes that counsel for TCI was not particularly pressed for time during closing argument. Indeed, there was sufficient time for TCI's attorneys to tell the jury on numerous occasions how little time had been allowed for closing arguments and to extol the virtues of the Sixth [sic] Amendment right to a jury trial in civil cases. There also was sufficient time for TCI's attorneys to describe at great length how their client had been "hometowned" by plaintiff notwithstanding the fact that there was virtually no evidence to support this contention.[51] Under these circumstances, the Court concludes that the amount of time allocated for closing arguments was more than adequate.

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[51] *See* pages [60a-61a] *supra*.

E. Jury Instructions

Defendants' fifth argument in favor of a new trial is that several of the jury instructions submitted by the Court were in error. Only four of TCI's challenges to the jury instructions will be addressed herein; the remainder must be rejected as lacking merit.

First, TCI insists that the Court's *Noerr-Pennington* instruction[52] failed to set out the precise scope of that defense. The Court disagrees. The instruction was based directly on *Westborough Mall v. City of Cape Girardeau*, where the Eighth Circuit explained that "actions beyond 'traditional political activity' may not be protected by the *Noerr* exemption," particularly if the defendants' lobbying efforts were "accompanied by illegal or fraudulent actions."[53]

TCI next challenges the verdict director for plaintiff's state law tortious interference claim,[54] asserting that the Court's instruction did not adequately define the elements of the tort. This argument is wholly without merit. The instruction given by the Court was based directly on a pattern instruction[55] which has been approved by the Missouri Supreme Court Committee on Jury Instructions. The use of this instruction has been mandatory in the state court system for years. It is beyond the Court's comprehension how the use of a pattern jury instruction, which *must* be used in state court, can constitute reversible error with respect to plaintiff's state law claim.

Similarly, defendants' challenge to the Court's burden of proof instruction[56] must be rejected. Here again, the Court used the pattern burden of proof instruction which has been

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[52] Instruction No. 14.

[53] 693 F.2d at 746.

[54] Instruction No. 23.

[55] Mo. Approved Instr. 23.11 [1981 Revision]. The Court's only modification of the pattern instruction was the inclusion of an additional element—"Second, defendants knew of the business expectancy of plaintiff"—upon the request of TCI.

[56] Instruction No. 4.

approved for use in the state court system.[57] This burden of proof instruction is clear and concise. Its use did not constitute error.

Finally, defendants contend that the Court's instruction on natural monopoly[58] theory was erroneous as a matter of law. Specifically, defendants insist that "[t]he concept that the Sherman Act protects competition for the right to enjoy a natural monopoly is wholly without support in the law."[59] The Court must disagree. Contrary to TCI's characterization, the notion that the antitrust laws protect competition "for" the market in a natural monopoly situation enjoys ample support in the law.[60] Moreover, the Court's instruction correctly stated the law in this area. Accordingly, defendants' objections to the Court's jury instructions will be overruled.

F. Judicial Bias

Defendants' sixth ground for a new trial is an allegation that they "were denied a fair trial in this case due to the

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[57] Mo. Approved Instr. 3.01 [1981 Revision].

[58] Instruction No. 20. In the challenged portion of this instruction, the jury was told:

> ". . . In a natural monopoly situation, competition in the market is not economically feasible; consequently, in a natural monopoly situation, the purpose of antitrust laws is to protect competition for the right to serve the market. . . . Keep in mind that the purpose of the antitrust laws ordinarily is to protect competition in the market; however, if a market has room for only one firm, the antitrust laws are designed to protect competition for the right to enjoy that natural monopoly position."

[59] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 50.

[60] *See Omega Satellite Products v. City of Indianapolis*, 694 F.2d at 127 ("the antitrust laws protect competition not only in, but for, the market—that is, competition to be the firm to enjoy a natural monopoly . . . and by a modest extension competition to replace the existing natural monopolist") (citation omitted); *see e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 369-70 (1973); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 659-661 (1964); *Continental Cablevision v. American Elec. Power Co.*, 715 F.2d 1115, 1120-21 (6th Cir. 1983); *Westborough Mall v. City of Cape Girardeau*, 693 F.2d at 745 n. 7.

partiality and bias of the Court in favor of plaintiff and against defendants."[61] TCI specifically contends that the Court's "consistently pro-plaintiff rulings" conveyed the Court's bias to the jury and thus tainted the jury's verdict.[62] The short answer to defendants' accusations is that the Court simply was not biased in favor of plaintiff and against defendants. Instead, the Court made every effort to give this cause a fair and impartial hearing and to manifest its sense of impartiality from the bench. Moreover, to the extent that any comments made by the Court suggested its view of the evidence, the jurors were expressly instructed to "disregard all comments of the Court in arriving at [their] own findings as to the facts."[63]

The longer answer to defendants' charge of bias is this: the rulings which were allegedly the result of the Court's partiality were in fact the result of the incompetence of defendants' trial attorneys. For example, TCI claims that the following rulings were motivated by judicial bias: (1) the exclusion of Mr. Lee's expert testimony; (2) the limitation on Mr. Weinstein's expert testimony; and (3) the refusal to strike the testimony of Clarence Blume. As explained above,[64] however, each of these rulings was in fact necessitated by defense counsel's insistence on ignoring simple rules of evidence and procedure. In the case of Mr. Lee, the exclusion of his testimony was required because of counsel's failure to designate him as an expert witness in response to plaintiff's interrogatories. With respect to Mr. Weinstein's testimony, the Court's ruling was based on counsel's failure to supplement interrogatory answers and failure to abide by Fed. R. Evid. 615. Finally, concerning Clarence Blume, the Court's denial of defendants' motion to strike was based on counsel's failure to heed the contemporaneous objection rule. In sum, the Court simply was not biased in ruling on any of the issues in this case; TCI's assertion to the contrary is unfounded.

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[61] Suggestions in Support of Defendants' Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial, at page 28.

[62] *Id.* at 29-32.

[63] Instruction No. 3.

[64] *See* pages [57a-60a] supra.

Similarly, the Court's comments during trial, which were allegedly motivated by bias, were in fact attributable to the discourteous and belligerent manner in which defendants' trial attorneys conducted themselves. On numerous occasions, defense counsel responded to unfavorable evidentiary rulings by muttering to themselves, rolling their eyes, and hurling pens and legal pads at the counsel table with great force. All of these childish antics were performed openly in the presence of the jury, as if defense counsel was attempting to communicate to the jury that their client was being "railroaded" by virtue of the Court's adverse evidentiary rulings. In order to maintain control over the conduct of this trial, the Court admittedly was required to reprimand defense counsel from time to time. Nevertheless, the Court is certain that none of its comments, whether or not made in the presence of the jury, was unwarranted.[65] Consequently, the Court is compelled to hold that defendants' allegations of judicial bias are without basis in fact.

G. Juror Misconduct

The seventh and final point in defendants' motion for a new trial which will be addressed herein is an allegation that there was improper contact between one of plaintiff's attorneys, Mr. Long, and a member of the jury, Ms. Shern, and that this contact may have tainted the jury's verdict. There are two short answers to TCI's argument. First, there is no indication that the

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[65] For example, after excusing the jury and overruling defendants' motion to strike the testimony of Clarence Blume, the Court felt compelled to reprimand attorney Farrow for representing TCI in this lawsuit in the first instance. The dialogue between Mr. Blume and Mr. Farrow made it quite clear that Mr. Farrow was so intimately involved in the events leading up to this litigation that he should have appeared as a witness, not as an attorney. Disciplinary Rule 5-101(B) of the ABA Code of Professional Responsibility expressly provides that a lawyer should refuse employment in a contemplated or pending lawsuit if he knows that he ought to be called as a witness. Undoubtedly, defense counsel believed that the reprimand of Mr. Farrow was merely a manifestation of the Court's hostility. In reality, however, the Court issued the reprimand to Mr. Farrow and a warning that his conduct might result in a malpractice action because this Court fully expects all attorneys practicing before it to live up to acceptable standards of professional ethics.

alleged contact between attorney Long and juror Shern related to the merits of this case. Thus, in sharp contrast to the case upon which TCI relies,[66] there is no basis for concluding that any improper communications related to merits of the case.[67] Second, the Court notes that Ms. Shern was an alternate juror who did not participate in the jury's deliberations. On each day of the trial, the jurors were instructed not to discuss the case with each other. Thus, even assuming that juror Shern was tainted by virtue of her alleged contact with attorney Long, there is nothing which suggests that this taint spread to the other jurors who actually deliberated over this case. In conclusion, TCI's bare allegation of prejudicial juror misconduct has no support in the record. Accordingly, defendants' motion for a new trial must be overruled.

IV. MOTION FOR CLARIFICATION OF THE JUDGMENT

The next item on the Court's post-trial agenda is modification of the judgment in this case to reflect the fact that the damage awards under each of plaintiff's claims are alternative, not cumulative. Both plaintiff and defendants are in agreement that plaintiff may recover *either* treble damages of $32.4 million plus a reasonable attorney's fee under plaintiff's antitrust conspiracy claim *or* treble damages of $32.4 million plus a reasonable attorney's fee under plaintiff's actual monopolization claim *or* actual and punitive damages totalling $35.8 million under plaintiff's tortious interference claim. The parties further agree that plaintiff may not recover punitive damages under the state law claim in addition to treble damages under the antitrust laws. The Court concurs. Treble damages are

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[66] *Mattox v. United States*, 146 U.S. 140 (1892).

[67] TCI also purports to rely on *California Fruit Exchange v. Henry*, 89 F. Supp. 580 (W.D. Pa. 1950). In *Henry*, however, the district court ultimately refused to grant a new trial after noting that "[a] new trial should not be granted because of irregularities in the conduct of a juror or counsel unless it is made to appear that the alleged misconduct was prejudicial to one of the party litigants." *Id.* at 589. This Court concurs in the reasoning and result set forth in the *Henry* opinion.

designed "to punish past violations of the antitrust laws . . . [and] to deter future antitrust violations."[68] Punitive damages have a similar purpose.[69] Accordingly, it would be inappropriate to allow plaintiff to recover both treble damages and punitive damages.[70] The judgment in this case will be modified to account for this fact.

V. MOTION FOR ENHANCEMENT OF PLAINTIFF'S ATTORNEY'S FEES

The penultimate question before the Court concerns plaintiff's motion for enhancement of its attorney's fees. As noted above, plaintiff is entitled to an award of a reasonable attorney's fee by virtue of its success on its antitrust claims.[71] As a result of negotiation, plaintiff and defendants have entered into a stipulation as to the amount of attorney's fees and expenses incurred herein. The only issue remaining for the Court is whether plaintiff is entitled to any enhancement of the attorney's fee award. Plaintiff seeks a three-fold increase in the amount of its attorney's fees.

In support of enhancement, plaintiff offers a three-part argument. First, plaintiff contends that enhancement is appropriate because of the risk involved in pursuing this case. Second, plaintiff maintains that enhancement is warranted in view of the uniformly favorable results obtained. Third, plaintiff asserts that enhancement is justified because of the high quality of representation rendered by plaintiff's attorneys.

The Court is inclined to agree that the risks involved in initiating this litigation were substantial and that the professional services rendered by plaintiff's attorneys were, for the most part, of a high quality. Nevertheless, the Court will

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[68] *American Soc. of Mech. Eng'rs v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1947 (1982).

[69] *See* Mo. Approved Instr. 10.01 [1983 Revision].

[70] *See McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1381 (8th Cir. 1983); *Superturf, Inc. v. Monsanto Co.*, 660 F.2d 1275, 1283-84 (8th Cir. 1981); *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. 1979).

[71] *See* 15 U.S.C. § 15.

decline to enhance plaintiff's attorney's fees. It bears emphasis that the moving party must meet a "heavy burden" to establish its entitlement to fee enhancement.[72] It also should be noted that fee enhancement is warranted only in an exceptional case.[73]

Turning to the instant case, the Court notes that plaintiff and its attorneys have already been rewarded handsomely for undertaking this litigation. Although plaintiff and its attorneys admittedly undertook a substantial risk by bringing this lawsuit, they knew that a favorable verdict almost certainly would be accompanied by a damage award of approximately $10 million. Thus, whoever took the risk of financing this lawsuit apparently had calculated that the potential payoff justified the initial investment.[74]

Finally, the Court notes that the quality of representation factor has already been accounted for in calculating the base attorney's fee. The keystone of good lawyering is preparation. Here, the generally high quality of representation afforded by plaintiff's counsel is directly attributable to thorough preparation which, in turn, is directly reflected in the number of hours that went into the calculation of the base fee. Consequently, in the absence of any truly exceptional circumstances, the Court will overrule plaintiff's motion for enhancement of its attorney's fees.

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[72] *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1276 (8th Cir. 1980); *see also Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1314 (8th Cir. 1981).

[73] *See Blum v. Stenson*, 104 S. Ct. 1541, 1548-50 (1984).

[74] It is irrelevant whether plaintiff or plaintiff's attorneys assumed the risk of financing this case. If the attorneys were working on a straight hourly fee, plaintiff knew that it would receive the entire judgment in the event of a favorable verdict. On the other hand, if the attorneys took this case on a contingent fee, they assumed the risk of investing their time in this case for a chance at sharing in a multimillion dollar judgment. In short, there was no lack of incentive for the people who financed this case. *Cf. Blum v. Stenson*, 104 S.Ct. at 1548 (a reasonable fee must be sufficient to attract competent counsel but should not be a windfall).

VI. MOTION FOR A STAY OF EXECUTION

The final matter before the Court is defendants' motion to stay execution on the judgment herein pending appeal. In support of its motion, defendants contend that their fiscal integrity[75] is sufficient assurance that plaintiff can eventually collect on the judgment. Defendants further submit that it would be a tremendous hardship if they were forced to post a supersedeas bond to cover the amount of the judgment in this case.[76] Be that as it may, the Court does not agree that the sheer size of defendants is sufficient security for the judgment herein. Under ordinary circumstances, a supersedeas bond is required to protect a prevailing plaintiff.[77] Indeed, the purpose of a supersedeas bond is to preserve the status quo while protecting the prevailing plaintiff. In the instant case, however, defendants seek to preserve the status quo without providing any security to plaintiff other than TCI's word. Although the Court does not doubt TCI's integrity, it does not believe that plaintiff should be required to bear any risk pending appeal. The jury heard the evidence in this case and rendered large, though not excessive, damage awards. If one party should endure any inconvenience in order to maintain the status quo, it should be TCI. Consequently, defendants' motion for a stay of execution pending appeal will be overruled.

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[75] According to the affidavit of D.F. Fisher, Treasurer of TCI, shareholder equity in the corporation totalled $223,178,000.00 as of September 30, 1984.

[76] Affiant Fisher stated:

"Supersedeas bonds are rarely written in amounts as large as comtemplated [sic] in this case. Numerous underwriters have been contacted without success."

[77] *See* Fed.R.Civ.P. 62(d).

VII. CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion for judgment notwithstanding the verdict and alternative motion for a new trial are overruled. It is further

ORDERED that defendants' motion for clarification of the judgment is sustained and the judgment herein is modified to provide that plaintiff may recover treble damages under either of its antitrust claims or actual and punitive damages under its tortious interference claim, but may not recover damages under more than one claim. It is further

ORDERED that, pursuant to the stipulation entered into by the parties, plaintiff's motion for attorney's fees and expenses on plaintiff's antitrust claims, in the amount of $1,311,104.00, is sustained. It is further

ORDERED that plaintiff's motion for enhancement of its attorney's fees is overruled. It is further

ORDERED that defendants' motion for a stay of execution is overruled.

/s/ SCOTT O. WRIGHT

SCOTT O. WRIGHT
United States District Judge

Date: June 5, 1985

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CENTRAL TELECOMMUNICATIONS, INC.,
Plaintiff,

vs.

CITY OF JEFFERSON CITY, MISSOURI,
and TCI Cablevision, Inc.,
Defendants.

No. 83-4068-CV-C-5

[FILE STAMP]

ORDER

I. INTRODUCTION

Plaintiff, Central Communications, Inc. (Central), has filed a fourteen-count complaint asserting anti-trust, constitutional and common law claims against the City of Jefferson City and TCI Cablevision, Inc. (TCI). The defendants have filed motions to dismiss which are pending before the Court.

In support of its claims, Central alleges that since 1978 defendant TCI has been the sole operator of a cable television system within the city limits of Jefferson City. TCI has conducted its cable television system pursuant to a "license" or "franchise" granted through city ordinances. In late 1980, the City began studying and thereafter adopted on December 15, 1980, a bid procedure by which the new franchise (to be effective April 1, 1981) could be awarded. The City initiated

this process by sending a "Request for Proposals for Cable Television Service" (RFP) to numerous cable television companies, including defendant TCI.

The City's bid process mandated that all bids were to be based entirely upon the RFP specifications and that said bids, once received by the City, were to be evaluated by an independent consulting agency in Dallas, Texas.

The plaintiff alleges that during the time that bids were being considered by the City, TCI illegally contacted and threatened the consultant retained by the City, threatened to cut off cable television service to the City, withheld franchise payments from the City, instituted sham litigation against the City, met illegally with City officials, and threatened other cable company bidders.

Plaintiff further alleges that on January 25, 1982, the City Council voted on two bills and selected the plaintiff's bid. It is alleged that they further authorized and directed the City Attorney to negotiate with plaintiff in order to prepare the necessary franchise documents, including two ordinances, a regulatory ordinance and a franchise award ordinance.

The plaintiff further alleges that the City Attorney conducted secret negotiations with the defendant TCI while representing to the plaintiff that it would be awarded the franchise.

On April 20, 1982, the Council voted 7-3 in favor of awarding the franchise to plaintiff Central. The plaintiff alleges that Mayor Hartsfield, acting pursuant to an agreement and in concert with TCI, the City Attorney and others, vetoed the Council's franchise award to Central. On the same date and after the Mayor's veto, ordinances were presented to the Council awarding the franchise to the defendant TCI. The Council voted 5-5 on these ordinances and they were passed by the deciding vote of the Mayor.

Plaintiff alleges that Mayor Hartsfield's veto and subsequent votes were in violation of state law prohibiting such action by the Mayor where he has a conflict of interest. The

plaintiff further alleges that the Mayor had a conflict of interest because he worked for a telephone company from whom the defendant TCI rented space.

Mayor Hartsfield's veto and subsequent votes were allegedly cast pursuant to an agreement with TCI, City Attorney Utterback and others not yet known by the plaintiff to award the franchise to TCI despite its having not presented a bid which complied with the RFP procedure.

II. MOTIONS TO DISMISS

A. *Anti-trust Claims*

1. *Parker* exemption

The City asserts that it is immune from liability because its actions were authorized by the State of Missouri. Federal anti-trust laws do not prohibit a state from exercising its sovereign powers to impose certain anti-competitive restraints. The Supreme Court first addressed the conflict between federal anti-trust law and state sovereign power in *Parker v. Brown,* 317 U.S. 341 (1943). The Court stated:

> We find nothing in the language of the Sherman Act or in its history which suggest that its purpose was to restrain a state or its officers or agents from activity directed by its legislature. In a dual system of government in which, under the Constitution, the States are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

Id. at 350-51. A municipality is not itself sovereign and, accordingly, is entitled to the *Parker* exemption "only to the extent that [it] acted pursuant to a clearly articulated and affirmatively expressed state policy." *Community Communications Co. v. City of Boulder,* ___ U.S. ___, ___, 102 S.Ct. 835,

842 (1982), *citing, City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978). A two-prong test must be satisfied to establish a state policy sufficient to confer *Parker* immunity upon a municipality. "The legislature must have authorized the challenged activity, *and* it must have done so with an intent to displace competition." *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005, 1011 (8th Cir. 1983) (citations omitted) (emphasis added). "[A] sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." *Id.* at 1012-13. (citations omitted).

The City of Jefferson City asserts that the first element of the two-prong *Parker* immunity test has been met in this case. The City asserts that the challenged activity in this case is the regulation and control of cable television businesses and that such activity has specifically been authorized by the Missouri legislature.[1] The plaintiff, however, asserts that the challenged

[1] The Missouri legislature has expressly authorized the City to regulate telephone poles and excavations in and under its streets and rights of way. Mo. Rev. Stat. § 77.520 (1978). The Missouri Supreme Court has determined that municipalities have an "indispensible duty" to control the use of their streets. *Planned Industrial Expansion Authority v. Southwestern Bell Telephone Co.*, 612 S.W.2d 772, 776 (Mo. en banc 1981). In light of this traditional duty to regulate, the Missouri Supreme Court has held:

> The rule must be considered settled, that no person can acquire a right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power . . . . The power to grant franchises resides in the state, and a city, in granting a franchise, acts as agent for the state.

Shartel ex rel. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W.2d 394, 397 (en banc 1932). In *Cablevision Inc. v. City of Sedalia*, 518 S.W.2d 48 (1974), the Missouri Supreme Court held inherent within a municipality's "broad power of control over the streets" is the power to regulate cable television. *Id.* at 52. Before a cable company could operate in a city, "some sort of grant from the city would be necessary, inasmuch as the installation of the operation of the system would involve the use of the city streets." *Id.* A city not only has the right to grant a cable company the privilege to use its streets but, according to the Missouri Supreme Court, it can reserve in its franchise grant the right to approve the rates set by cable companies. *Id.* at 54.

activity in this case is an alleged conspiracy between certain City officials and defendant TCI.

The plaintiff in this action has alleged a conspiracy between certain City officials and defendant TCI to restrain and monopolize trade. Plaintiff alleges that on April 20, 1982, the City Council voted in favor of awarding a franchise to the plaintiff to deliver cable television to the City of Jefferson City. Plaintiff further alleges that the Mayor then vetoed the franchise award. The veto, plaintiff alleges, was a result of a conspiracy with defendant TCI and was in violation of state law because the Mayor had a conflict of interest which prohibited him from participating in the bid procedure. The Mayor allegedly was employed at the local telephone company, from whom defendant TCI rented space for its cable. Because of the foregoing allegations, plaintiff alleges that the defendant City is unentitled to *Parker* immunity.

In *Westborough Mall v. City of Cape Girardeau, Missouri,* 693 F.2d 733 (8th Cir. 1982), the Eighth Circuit ruled that *Parker* immunity did not, as a matter of law, exempt the city from liability where the plaintiff alleges an illegal conspiracy. *Id.* at 746.

In *Westborough Mall* the plaintiffs alleged "a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property. *Id.* at 746. Such action, the Court held, was not ". . . in furtherance of any clearly articulated state policy." *Id.* Thus, plaintiff Central asserts that the *Parker* immunity is unavailable to the City in this case because a conspiracy to circumvent competitive bid procedures, to interfere with plaintiff's prospective business relationships, and to deprive the plaintiff of a franchise is not in furtherance of any clearly articulated state policy. Essentially, plaintiff asserts that these acts exceed the scope of activities contemplated by the Missouri legislature. Well-pleaded material allegations are deemed admitted for purposes of determining whether a cause of action has been stated; thus, plaintiff's complaint against the City cannot be dismissed at this point because of *Parker* immunity.

2. *Noerr-Pennington Doctrine*

The defendants assert that plaintiff's anti-trust claims are barred by the *Noerr-Pennington* doctrine. "The *Noerr-Pennington* doctrine exempts from the anti-trust laws lobbying and other joint efforts by private individuals to obtain legislative or executive action." *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 745 (8th Cir. 1982) (citation omitted). The plaintiff has alleged that defendant TCI engaged in unlawful conduct and employed illegal means to influence the City, thus the *Noerr-Pennington* doctrine may not be relied on to exempt the defendants from anti-trust liability at this state of the proceedings. *Westborough Mall v. City of Cape Girardeau*, 693 F.2d 733, 745-46 (8th Cir. 1982).

3. *Tenth Amendment*

The City asserts that the Tenth Amendment mandates rejection of the plaintiff's anti-trust claims. The Tenth Amendment bars the operation of any federal enactments that "directly displace the States' freedom to structure integral operations in the areas of traditional government functions . . . ." *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

In *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), the Supreme Court set forth the following test to be used in determining if the Tenth Amendment has been violated by the challenged federal statute:

> First, there must be a showing that the challenged statute regulates the "States as States." (citations omitted). Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." (citations omitted). And third, it must be apparent that the States' compliance with federal law would directly impair their ability "to structure integral operations in areas of traditional functions."

Id. at 287-88. Without deciding the first or second prerequisite for invoking Tenth Amendment protection, it is not clear at the

pleading stage that compliance with the antitrust laws in this case would directly impair the ability of the City of Jefferson City to structure integral operations in areas of traditional governmental functions. Thus, the motion to dismiss based on Tenth Amendment grounds must be denied.

4. *"Single Trader" Defense*

The City of Jefferson City asserts that it is protected from anti-trust liability on plaintiff's conspiracy claims by the *Colgate* doctrine. The Supreme Court in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), stated that the *Colgate* doctrine meant

> . . . no more than that a simple refusal to sell to customers who will not resell at prices suggested by the seller is permissible under the Sherman Act. In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

Id. at 43. Thus, the *Colgate* doctrine allows manufacturers to set suggested retail prices and to refuse to sell to retailers who do not abide by those suggested prices. The doctrine is inapplicable in the instant case. The plaintiff has alleged a conspiracy between the City and a competitor to exclude the plaintiff from the cable television market in the City of Jefferson City. A city does not have, by virtue of the *Colgate* doctrine, an absolute right to determine which businesses can compete within its environs. The dismissal of the complaint on the basis of the *Colgate* doctrine is denied.

5. *Substantive Allegations*

The defendants assert that plaintiff has failed to state a cause of action for violation of the anti-trust laws. It is well-

settled that in determining whether a complaint states a cognizable claim, the complaint must be construed in the light most favorable to the plaintiff, and it should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As the Supreme Court noted in *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), it is not the function of the reviewing court to assess the merits of a particular claim when ruling on a motion to dismiss but, rather, to determine whether the plaintiff may introduce evidence to support his claim. Thus, although it may ultimately develop that the plaintiff is not entitled to recover on its anti-trust claims, it would be premature to rule that the plaintiff cannot properly establish any facts which would meet the legal requirements necessary to recover under the anti-trust laws.

The scope of a court's inquiry on a Rule 12(b)(6) motion is limited to the pleadings. However unlikely it may be that the plaintiff can support its allegations, the Court cannot dismiss the complaint for failure to state a cause of action. Nor would it be appropriate for the Court to treat the motion to dismiss as a motion for summary judgment pursuant to F.R.Civ.P. 12(b). Before a motion to dismiss which contains extra-pleading material can be treated by the Court as a motion for summary judgment, all parties must be given a reasonable opportunity to present pertinent evidence. In this case, the extra-pleading matters asserted by the defendants may more efficiently and appropriately be considered in a motion for summary judgment.

B. *Constitutional Claims*

Plaintiff in Count Eleven asserts that the City and TCI conspired to deprive plaintiff of its legally-protected rights, contrary to 42 U.S.C. § 1985(3). Section 1985(3) requires that there be "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' actions." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

Plaintiff has not alleged that an "invidiously discriminatory animus" was behind the defendants' alleged conspiracy. Plaintiff asserts in response to the motion to dismiss that the defendants sought to prevent the award of a franchise to any company other than TCI, thus discriminating against a class comprised of businesses competing for the Jefferson City cable television market. Section 1985(3) does not ". . . reach conspiracies motivated by economic or commercial animus." *United Brotherhood of Carpenters & Joiners v. Scott*, — U.S. —, —, 103 S. Ct. 3352, 3360 (1983). A class comprised of cable television companies is insufficient to support a cause of action for violation of § 1985(3). *See McLellan v. Mississippi Power & Light Co.*, 545 F.2d 919, 928 (5th Cir. 1977) (discussion of artfully contrived classes found to be unprotected by § 1985(3)). The plaintiff has not stated a cause of action under 1985(3).

Plaintiff's other allegations of constitutional violations are sufficient and the motion to dismiss as to these violations will be overruled.

C. *Common Law Claims*

1. *Sovereign Immunity*

The City asserts that it is immune from plaintiff's common law tort claims by virtue of the doctrine of sovereign immunity. While municipalities are not liable for torts occurring during the performance of governmental functions, they are liable for torts arising out of a proprietary function. *Davis v. City of St. Louis*, 612 S.W.2d 812, 814 (Mo.App.E.D. 1981). "Through use of the 'governmental-proprietary dichotomy,' liability or non-liability of a municipality for its torts has come to depend upon the character of the act performed, not the nature of the tort." *Id.* (citation omitted). An act performed for the common good of all is a governmental act, while an act performed for the benefit or profit of the municipality as a corporate entity is a proprietary act. *Id.* A regulation beyond the mere right to use

a street has been held by the Missouri Supreme Court to be a proprietary function. *State v. Light & Development Co.*, 246 Mo. 618, 152 S.W. 67, 75 (1912). The regulation by the City of the cable television business is a proprietary function and sovereign immunity does not apply.

2. *Substantive Allegations*

Plaintiff has alleged both tortious interference with a legitimate business expectancy and intentional interference with prospective contractual relations. These claims are redundant. The Missouri Supreme Court has declared that "reasonable expectancies of commercial relations" are protected from tortious interference. *Fisher, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 315 (Mo. En banc 1970) (citing *Downey v. United Weatherproofing, Inc.*, 363 Mo. 852, 858, 253 S.W.2d 976, 980 (1953)). Plaintiff has stated a cause of action for tortious interference in Count Twelve; Count Fourteen, therefore, is dismissed as redundant. The claim set forth in Count Fourteen for tortious interference with prospective contractual relations is simply a restatement of the claim set forth in Count Twelve for tortious interference with a business expectancy.

In accordance with the foregoing, it is hereby

ORDERED that Counts Eleven and Fourteen are dismissed. It is further

ORDERED that the plaintiff respond within twenty (20) days to the pending motion for summary judgment filed by defendant TCI.

/s/ SCOTT O. WRIGHT

SCOTT O. WRIGHT
District Judge

Date: February 29, 1984

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT [FILE STAMP]

No. 85-1805WM

CENTRAL TELECOMMUNICATIONS, INC.,
Appellee,
v.
TCI CABLEVISION, INC., *et al.*,
Appellants.

Appeal from the United States District Court for the Western District of Missouri.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgement of the district court in this cause be affirmed in accordance with the opinion of this Court.

August 26, 1986

A true copy.

ATTEST: /S/ ROBERT D. ST. VRAIN
Clerk, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 85-1805-WM

CENTRAL TELECOMMUNICATIONS, INC.,

Appellee,

v.

TCI CABLEVISION, INC., *et al.,*

Appellants.

Appeal from the United States District Court for the Western District of Missouri.

Appelants' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 16, 1986

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* v. TCI CABLEVISION, INC., *et al.,* *Defendants.*	83-4068-CV-C-5 Chief Judge SCOTT O. WRIGHT

JUDGMENT IN A CIVIL CASE

This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED

On the claim of plaintiff for a combination or conspiracy in restraint of trade, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

On the claim of plaintiff for actual monopolization, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at $10,800,000.00.

On the claim of plaintiff for tortious interference, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at $10,800,000.00.

The jury unanimously assesses punitive damages against the defendants under Instruction No. 25 at $25,000,000.00.

[FILE STAMP]

Entered on January 25, 1985

CLERK
R. F. CONNOR
(BY) DEPUTY CLERK
/S/ SUE E. STAHL

IN THE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* v. TCI CABLEVISION, INC., *et al.,* *Defendants.*	[FILE STAMP] Civil Action No. 83-4068-CV-C-5

JUDGMENT IN CIVIL CASE

This action came before the Court and a jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED:

On the claim of plaintiff for a combination or conspiracy in restraint of trade, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

On the claim of plaintiff for actual monopolization, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at Ten Million Eight Hundred Thousand ($10,800,000) Dollars, trebled by the Court to Thirty-Two Million Four Hundred Thousand ($32,400,000) Dollars plus costs and a reasonable attorney's fee.

On the claim of plaintiff for tortious interference, the jury finds unanimously in favor of the plaintiff, Central Telecommunications, Inc.

The jury unanimously assesses the actual damages of plaintiff under Instruction No. 24 at Ten Million Eight Hundred Thousand ($10,800,000) Dollars.

The jury unanimously assesses punitive damages against the defendants under Instruction No. 25 at Twenty-Five Million ($25,000,000) Dollars.

/s/ SCOTT O. WRIGHT

SCOTT O. WRIGHT, Chief Judge

Kansas City, Missouri
Date: 5-29-85

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP]

CENTRAL TELECOMMUNICATIONS, INC.,
Plaintiff,
vs.
TCI CABLEVISION, INC., *et al.*
Defendants.

No. 83-4068-CV-C-5

ORDER

It is hereby

ORDERED that each of the following motions is overruled as being moot:

(1) Plaintiff's motion for sanctions (filed 3/29/84);

(2) Plaintiff's motion for sanctions (10/18/84);

(3) Defendants' motion to hold defendants' motion for a stay in abeyance (2/25/85); and

(4) Defendants' motion for an evidentiary hearing on attorney's fees issue (filed 3/12/85).

/s/ SCOTT O. WRIGHT
SCOTT O. WRIGHT
United States District Judge

June 5, 1985.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

CENTRAL TELECOMMUNICATIONS, INC., *Plaintiff,* v. TCI CABLEVISION, INC., *et al.,* *Defendants.*	83 4068 CV C 5 Chief Judge SCOTT O. WRIGHT

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for clarification of the judgment is sustained and the judgment herein is modified to provide that plaintiff may recover treble damages under either of its antitrust claims or actual and punitive damages under its tortious interference claim, but may not recover damages under more than one claim. It is further

ORDERED that plaintiff's motion for enhancement of its attorney's fees is overruled.

It is further

ORDERED that defendants' motion for a stay of execution is overruled.

[FILE STAMP]

Entered on June 5, 1985

CLERK
R. F. CONNOR

(By) DEPUTY CLERK
/s/ B. J. WOLKING

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP
Mar. 16, 1981]

TCI CABLEVISION, INC.,
a Nevada Corporation,
Plaintiff,

v.

CITY OF JEFFERSON CITY, MISSOURI,
a Municipal Corporation,
Defendant.

[JURY DEMANDED]

Case No.
81-4054-CV-C-W

COMPLAINT:

ANTITRUST, FIRST AMENDMENT, EQUAL PROTECTION, CIVIL RIGHTS, IRREVOCABLE LICENSE, LICENSE WITH AN INTEREST, EQUITABLE ESTOPPEL, VESTED RIGHTS, BREACH OF CONTRACT, AND DEDICATION CLAIMS; AND DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff TCI Cablevision, Inc. (hereinafter "TCI"), a Nevada corporation, demanding a jury trial, brings this action against the City of Jefferson City, Missouri, a municipal corporation (hereinafter "City"), and alleges as follows:

PRELIMINARY ALLEGATIONS

1. Defendant City is a municipal corporation existing under and by virtue of the laws of Missouri and located within the Western District of Missouri. The violations of law herein

described have been and are being performed within the Western District of Missouri; and the resulting injury to plaintiff has been and is being suffered within the Western District of Missouri.

2. Plaintiff TCI at all times herein mentioned was, and now is, a corporation in good standing existing under and by virtue of the laws of the State of Nevada. TCI was, and now is, licensed to do business in the State of Missouri, and is the lawful owner and operator of an existing cable television system (hereinafter sometimes referred to as a cablecasting system) within the City of Jefferson, State of Missouri.

3. A cable television system is not a public utility. A cable television system is a disseminator of news, information, and entertainment, and is thus a recognized First Amendment medium. By use of various means, including satellite-fed signals, cable television provides both original-content programming and programming which is selectively chosen by the cable television company from a variety of program sources.

4. Providing cable television service involves the conduct of business in interstate commerce.

5. On or about December 18, 1967, International Telemeter Corporation (a predecessor of TCI) entered into a ten-year, non-exclusive contract with the City for the purpose of providing cablecasting services to the City's residents. This contract and an associated permit are evidenced by the provisions of Ordinance 7974, and Ordinance 8356, and the acceptance by plaintiff's predecessors of the same. TCI ultimately succeeded to the contractual rights of International Telemeter Corporation by assignment, which assignment was approved by the City. TCI has operated a cable television system in the City since 1978.

6. At the time of the above-mentioned assignment, and repeatedly thereafter, the City indicated to TCI that it wanted TCI to expand the system and make substantial improvements in the system.

7. In reliance upon City's express approval of the above-mentioned assignment, and the resulting relationship between TCI and City, and in response to and reliance on continuing requests by the City to improve its cable television system, TCI has since 1978 expended additional and substantial sums of money to maintain, upgrade, extend, and improve its cable television system. Much of this additional investment was not required under the terms of the 1971 agreement, but was nonetheless requested by the City and provided by TCI pursuant to and in reliance upon such requests. The City at all times was informed of and had actual knowledge of such expenditure efforts, and investments by TCI.

8. In addition to the above-mentioned improvements and investments, TCI has in the past proposed certain other improvements and expanded programming which the City has either refused to allow, or has effectively prevented by not permitting TCI to charge subscriber rates sufficient to support such activities.

9. In late 1980, and without TCI's knowledge, the City initiated efforts to conduct a "Request for Proposals" (RFP) process. Pursuant thereto, the City sent a "Request For Proposals For Cable Television Service" to TCI and numerous other cable television companies. This RFP document (attached hereto as Exhibit 1) contains more than 200 pages of detailed specifications regarding the quality and quantity of cablecasting service the City desires. The RFP specifications are stated by the City to reflect "the City's regulatory policies" (Exhibit 1, page 6), but must be accepted by contract before the City will allow a chosen company to serve the City, and the terms of said contract are "incontestable."

10. The plaintiff is informed and believes, and thereupon alleges, that, in combination with other as yet unknown conspirators, the City is utilizing the RFP process to: (1)exclude plaintiff from the Jefferson City cable television market; and (2) select one cable television company to serve the Jefferson City cable television market, to the exclusion of all other

members of the cable communications media. Plaintiff is further informed and believes, and thereupon further alleges, that the RFP is a sham and a mere mechanism whereby the City will ratify a predetermination that TCI is to be excluded from the Jefferson City cable television market.

11. The City has gone forward with its RFP process, and did require any cable television company interested in serving the Jefferson City market to submit a detailed proposal pursuant to the RFP on or before March 9, 1981. Three different cable television companies did make differing applications to the City on March 9, 1981, all of which speak for themselves. TCI was one of those companies, and its application was, *inter alia,* for a renewal of its permit to engage in a lawful business in the City of Jefferson. The City has stated that it will consider TCI's permit to be "expired" on April 21, 1981; and that no cable television company will be allowed to operate after April 21, 1981, without a permit agreed to by the City.

12. Plaintiff is informed and believes, and thereupon alleges, that other members of the media in Jefferson City are not required to accept specifications such as those contained in the cable television RFP as a condition to engaging in their various business and First Amendment activities.

[ ][1]

SECOND CLAIM OF RELIEF
INJUNCTION—VIOLATIONS OF THE
FIRST AMENDMENT

23. TCI incorporates herein by reference the allegations of paragraphs 1 through 20 above, and further alleges as follows.

24. TCI is a member of the media, disseminating, *inter alia,* news, entertainment, and information. TCI engages in First Amendment activity in the City of Jefferson pursuant to a permit issued by the City.

---

[1] Brackets indicate that material has been deleted.

25. This Claim for Relief seeks to redress the deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution, and is brought pursuant to 42 U.S.C. 1983 and 28 U.S.C. §§2201 and 2202. Jurisdiction is conferred on this Court by 28 U.S.C. §§1343 and 1331.

26. The RFP and the other actions alleged above presently deprive and presently threaten to further deprive plaintiff TCI of rights guaranteed by the First Amendment, are discriminatory, and also unlawfully condition TCI's right to engage in First Amendment activity on compliance with the various above-mentioned requirements.

27. By reason of the City's above-described actions, TCI's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution have been violated and infringed. TCI has no adequate legal, administrative or other remedy by which to prevent or minimize the continuing irreparable harm to its constitutional rights. Unless the City is enjoined from the above-described violations of the freedom of speech and press, TCI will continue to suffer great and irreparable injury as aforesaid.

WHEREFORE, TCI prays for judgment as hereinafter set forth.

[ ]

WHEREFORE, plaintiff prays as follows:

A. For damages as alleged above and in such further amounts as are proved.

B. For the trebling of damages as appropriate.

C. For a declaration that: (1) the RFP process and its terms violate the First Amendment; and (2) the defendant is estopped to deny plaintiff the right to continue operating its cable television system in the City of Jefferson.

D. For an injunction permanently enjoining defendant from violating plaintiff's constitutional rights and from conspiring to unreasonably restrain trade.

E. For reasonable attorney's fees and costs.

F. For such other and further relief the Court deems just.

Dated: March 11, 1981

FARROW, SCHILDHAUSE & WILSON

By: /s/ HAROLD R. FARROW

Harold R. Farrow
Richard D. Harmon
H. Wayne Goodroe
35 Embarcadero Cove
Oakland, Calif. 94606
(415) 261-4100

HENDREN AND ANDRAE

By: /s/ HENRY ANDRAE

Henry Andrae
The Monroe House
235 East High Street
Jefferson City, MO 65102
(314) 636-8135

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP
Feb. 16, 1982]

TCI CABLEVISION, INC.,
a Nevada corporation,

Plaintiff,

vs.

CITY OF JEFFERSON CITY, MISSOURI,
a municipal corporation,

Defendant.

No. 81-4054-CV-C-W

ORDER

Upon due consideration, it is hereby

ORDERED that defendant's motion to dismiss is denied. *See Community Communications Company, Inc. v. City of Boulder, Colorado,* 50 U.S.L.W. 4144 (Jan. 13, 1982).

/s/ SCOTT O. WRIGHT
SCOTT O. WRIGHT
United States District Judge

Kansas City, Mo.

February , 1982.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

[FILE STAMP
Feb. 22, 1983]

CENTRAL TELECOMMUNICATIONS, INC.,
a Missouri corporation,
Plaintiff,

vs.

CITY OF JEFFERSON CITY, MISSOURI,
a municipal corporation, and
Serve: City Clerk and Mayor
Jefferson City, MO

TCI CABLEVISION, INC.,
a Nevada corporation,
Serve: CT Corp. Sys.
314 W. Broadway
St. Louis, MO 63102
Defendants.

Case No.
83-4068-CV-C-5

COMPLAINT AND DEMAND FOR JURY TRIAL

[ ][1]

[1] Brackets indicate that material has been deleted.

COUNT SEVEN

(FIRST AMENDMENT)

86. CTI incorporates by reference herein the allegations of paragraphs 1 through 48 above and further alleges as follows.

87. This claim for relief seeks to redress the deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983. CTI is a cable television company and a disseminator of, among others, news, information and entertainment. These activities engaged in by CTI are speech activities protected by the First Amendment.

88. Defendant City has deprived CTI of its rights to engage in First Amendment dissemination by denying CTI a franchise to operate a cable television system within the corporate city limits of the City. These actions were taken intentionally by defendant City, under color of law, as part of the official policies of the City.

89. Defendant City's denial of a cable television franchise to CTI constitutes regulation of CTI's First Amendment rights of expression under impermissibly discretionary, vague, invidious and standardless criteria and procedures, and thus violates CTI's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

90. The above-described violations of CTI's First Amendment rights were malicious or in conscious disregard of CTI's rights and have directly and proximately caused CTI to suffer damage in the amount of Ten Million Dollars ($10,000,000).

WHEREFORE, plaintiff prays for judgment against defendant City in the amount of Ten Million Dollars ($10,000,000) or the damages otherwise determined to have been sustained by plaintiff together with interest thereon, reasonable attorneys' fees and the costs incurred in this action. Plaintiff also prays for a declaration that the franchise ordinances passed by the City are void as impermissible regulation of plaintiff's First Amendment rights.

COUNT EIGHT

(FIRST AMENDMENT)

91. CTI incorporates by reference herein the allegations of paragraphs 1 through 48 and 86 through 90 above and further alleges as follows:

92. This claim for relief seeks to redress the conspiratorial deprivation, under color of law, of rights secured to plaintiff by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

93. Defendant TCI conspired and acted jointly or in concert with defendant City and certain elected or appointed officials of defendant City to deprive plaintiff CTI, unconstitutionally and under color of law as the official policies of the City, its rights to engage in First Amendment dissemination as described in paragraphs 86 through 90 above.

94. Defendant TCI, by conspiring and acting jointly or in concert with defendant City and certain elected or appointed officials as described above, deprived CTI of its First Amendment rights of expression through the City's arbitrary and wrongful denial to CTI of a cable television franchise as described above.

95. Defendant TCI's conspiracies and actions described above were undertaken maliciously, in conscious disregard of CTI's rights and with the express intent to deprive CTI of its rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

96. Defendant TCI's violations of CTI's constitutional rights have directly and proximately caused CTI to suffer damage in the amount of Ten Million Dollars ($10,000,000.00).

WHEREFORE, plaintiff prays for judgment against defendant TCI in the amount of Ten Million Dollars ($10,000,000.00) or the damages otherwise determined to have been sustained by plaintiff together with interest thereon, punitive damages in the amount of Twenty Million Dollars ($20,000,000.00), reasonable attorneys' fees and the costs incurred in this action.

[ ]

/s/ R. LAWRENCE WARD

R. LAWRENCE WARD

/s/ G. STEPHEN LONG

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Attorneys For Plaintiff

Plaintiff CTI hereby demands a jury trial pursuant to Local Rule 14.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by

reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) *Amount of damages payable to foreign states and instrumental titles of foreign states*

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if—

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) *Definitions*

For purposes of this section—

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[FILE STAMP]

CENTURY FEDERAL, INC.,
a California Corporation,
Plaintiff,

vs.

CITY OF PALO ALTO, CALIFORNIA,
a Municipal corporation;
CITY OF PALO ALTO UTILITIES,
a Municipal utility;
CITY OF MENLO PARK, CALIFORNIA,
a Municipal corporation; and
CITY OF ATHERTON, CALIFORNIA,
a Municipal corporation,
Defendants.

No. C-85-2168 EFL

Order Granting
Partial Summary
Judgment

This action involves an aspiring cable television operator's first amendment challenge to the defendant municipalities' use of an exclusive franchising arrangement to limit to one the number of cable operators granted access to those facilities necessary to install cables within the defendants' boundaries. Plaintiff now moves for an order granting partial summary judgment on the issue of liability, asking this Court to hold as a matter of law that such a government-imposed restriction on the number of cable speakers is facially invalid under the first amendment. After considering oral argument and reviewing the extensive briefs and exhibits filed on both sides, this Court hereby grants plaintiff's motion for partial summary judgment. In doing so, the Court holds only the following: First, that under the undisputed facts of this case, the insignificant, if any, increase in disruption to the public domain resulting from the

initial installation of more than one cable system, as opposed to a single system, does not constitute a substantial or important governmental interest so as to justify the suppression of all cable speakers except the one to which the municipalities grant permission to speak; and second, that because cable television is more closely analogous to newspapers than the broadcast media, the fact that the cable television market in a proposed service area is a natural monopoly does not justify greater governmental regulation of cable operators than would otherwise be allowed under the first amendment.[1]

I. Background

Plaintiff Century Federal, Inc., is an aspiring cable television (hereinafter "CTV") operator. The defendants (hereinafter "the Cities") are three California municipalities, Atherton, Menlo Park, and Palo Alto, and a utility company owned by Palo Alto. Plaintiff attempted to enter the CTV business in each of the Cities, but was refused a business license and was told that it must participate in the franchise selection process conducted by Palo Alto on behalf of all the Cities. Plaintiff also sought permission to use the utility poles owned by the Pacific Telephone and Telegraph Company, the Pacific Gas and Electric Company, and the defendant City of Palo Alto Utilities, but was refused "pole attachment services" because it had no CTV operating franchise.[2]

The franchise selection process conducted by the Cities had two parts. First, the Cities issued a Request for Proposals (hereinafter "RFP"). This document specified the minimum

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[1] Although plaintiff's complaint on its face challenges the very existence of the Cities' franchising process, including the minimum requirements a cable television operator must meet before being eligible for a franchise, *see infra* note 3, on this motion the Court expresses no opinion on any aspect of the franchising process other than that part which limits to one the number of operators initially granted access to the facilities necessary for the installation of a cable system.

[2] Section 53066 of the California Government Code authorizes municipalities to license or franchise the construction of CTV systems using public property and easements. Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1400 (9th Cir. 1985), *aff'd*, 106 S. Ct. 2034 (1986).

requirements that an applicant must meet in order to be considered for a franchise.[3] The RFP also requested certain technical, construction, ownership, and financial information concerning the applicant and its proposed system. The Cities planned subsequently to evaluate the applicants in a number of categories, including service and rates, technical/construction, financial, local commitment, and ownership/structure.

The second phase of the selection process involved negotiations with one or more of the so-called most qualified applicants. Although the RFP guidelines expressly referred to the granting of a "nonexclusive" franchise, implying that the Cities might grant a franchise to more than one CTV operator, it is undisputed that the Cities intended to grant a franchise to only one operator, at least initially. *See Central Telecommunications, Inc. v. TCI Cabletelevision, Inc.*, 800 F.2d 711, 712 n.1 (8th Cir. 1986) (under a similar RFP, court refers to such franchises as "de facto exclusive").

Of the four CTV operators who answered the RFP, which did not include plaintiff, the Cities targeted two for further negotiations. On October 7, 1985, the Cities awarded a franchise to Cable Coop, which, at least up until the date of oral argument on this motion, had not yet begun to install its CTV system.

Rather than participate in the RFP, plaintiff originally filed suit in this Court in September 1983, alleging that the franchising process as a whole violated the antitrust laws and the first amendment. *See Century Federal, Inc., v. City of Palo Alto,* 579 F. Supp. 1553 (N.D. Cal. 1984). On the antitrust claims, the Court granted defendants' motion to dismiss on the ground that the defendant municipalities were immune from liability for the challenged conduct. *Id.* at 1561. The Court denied the Cities' motion on the first amendment claims, however, finding that

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[3] An opinion published earlier in this case, Century Federal, Inc. v. City of Palo Alto, 579 F. Supp. 1553 (N.D. Cal. 1984), lists in detail the minimum requirements set forth in the RFP. *Id.* at 1554 n.3.

plaintiff's pleadings alleged a cognizable constitutional deprivation that gave rise to significant factual questions that could not be resolved on the pleadings alone. *Id.* at 1565.

Subsequent to the above rulings, in January 1985, in response to the passage of the Cable Communications Policy Act of 1984, 47 U.S.C. sections 521-611 (Supp. 1986), this Court dismissed plaintiff's original first amendment claims without prejudice.[4]

In early March 1985, however, the Ninth Circuit decided *Preferred Communications, Inc., v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1984), *aff'd,* 106 S. Ct. 2034 (1986) (hereinafter "*Preferred I*"). Reversing in part the district court's granting of a motion to dismiss, the Ninth Circuit held in a wide-ranging opinion that a municipality could not "limit access by means of an auction process to a given region of [a] City to a single cable television company, where the public utility facilities and other public property in that region necessary to the installation and operation of a cable television system are physically capable of accommodating more than one system[.]" *Preferred I,* 754 F.2d at 1411.

Within a few days after the release of the Ninth Circuit's decision, plaintiff filed the instant action, reasserting its first amendment claim.[5] The parties stipulated that the pleadings

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[4] This Court had hoped that the Communications Policy Act would resolve this litigation. The Act was intended to establish a comprehensive national CTV policy and envisions a franchising arrangement such as that proposed by the Cities. *See Preferred I,* 745 F.2d at 1400 n.3. The constitutionality of that Act is not being directly challenged in this litigation, but the Ninth Circuit has called into question the constitutionality of a number of its provisions in strong dicta in the *Preferred I* decision. *See id.* at 1401 n.4, 1411 n.14.

[5] In its earlier complaint, plaintiff also alleged a violation of the California constitution, but the parties did not assert any differences between plaintiff's rights under the first amendment and under the state constitution. *Century Federal,* 579 F. Supp. at 1554 n.1. In the instant action, plaintiff's complaint includes a challenge under the California constitution, but nearly all of the parties' discussion has focused upon the first amendment. Because this Court has found a violation of the first amendment, we do not reach the state constitutional issues.

and record of the prior action would be considered a part of this new action.

After the United States Supreme Court granted certiorari on the *Preferred I* decision, this Court stayed the disposition of the instant action pending the Supreme Court's decision. In *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986) (hereinafter *Preferred II*), the Supreme Court affirmed the judgment of the Ninth Circuit "on a narrower ground," *id.* at 2036, holding only that a CTV operator "seeks to engage [in activities that] plainly implicate the First Amendment," *id.* at 2037, and refusing to decide the applicable first amendment standard solely on the pleadings. *Id.* The Court left open the question of "whether the characteristics of cable television make it sufficiently analogous to another medium to warrant application of an already existing standard or whether those characteristics require a new analysis." *Id.* at 2038 (Blackmun, J., concurring).[6]

Two weeks after the Supreme Court's decision, plaintiff filed the instant motion for partial summary judgment. Essentially, plaintiff's position is that the suppression of all cable speakers except one cannot be justified by any important or substantial governmental interest.[7] The Cities, on the other

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[6] The parties have disputed the precedential effect of the Ninth Circuit's *Preferred I* decision in light of the Supreme Court's holding, particularly with regard to the Court's remark that it was affirming on a "narrower ground." *Preferred II*, 106 S. Ct. at 2036. To date, it appears that the Ninth Circuit interprets the Supreme Court's holding as an affirmation that is binding on the lower courts of this Circuit. *See* Pacific West Cable Co. v. City of Sacramento, No. 85-2143, slip op. at 6 (9th Cir. Aug. 20, 1986) (citing *Preferred I* as affirmed by the Supreme Court). The more difficult question is discerning which parts of the Ninth Circuit's opinion are essential to its holding and which parts are dicta. *See* Tele-Communications of Key West v. United States, 757 F.2d 1330, 1338 n.3 (D.C. Cir. 1985) (expressing uncertainty on the "precise basis" for the Ninth Circuit's opinion in *Preferred I*).

[7] The reference to "important or substantial" government interests is based on the second step of the *O'Brien* test, O'Brien v. United States, 391 U.S. 367, 377 (1968), which, as explained below, the Court finds determinative in the disposition of this motion. The Ninth Circuit also refers to such interests as "legitimate." *Preferred I*, 754 F.2d at 1406.

hand, propose five interests that are furthered by a franchising process that allows access to only one CTV system: [8] 1) minimizing disruption of the public domain; 2) promoting first amendment values by ensuring that their residents, who allegedly live in a market that will economically support only one CTV operator (i.e., a natural monopoly), will receive cable service from that CTV operator that will provide the most reliable and highest quality service; 3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; 4) ensuring

[8] The Cities dispute the characterization of the franchising scheme as restricting access to only one CTV operator on the ground that the mandatory commercial access channels provided by the chosen franchisee will guarantee to other nonfranchised CTV operators an opportunity to "speak" to the Cities' residents. Such a contention, however, is based on the faulty premise that the first amendment allows the government to infringe on the free speech rights of a speaker based on a possibility that there are alternative avenues of communication available to reach the desired audience. "[O]ne is not to have the exercise of his liberty of expression in an appropriate place abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939). Furthermore, a franchised operator might have use of as many as fifty or more channels on its own system, but a nonfranchised operator as few as one under a commercial access program.

In a separate opposition brief, defendant Menlo Park objects to the characterization on a different basis. Breaking from the other defendants, Menlo Park concedes that under the Ninth Circuit's *Preferred I* decision "it may lack authority to artificially limit to *one* the number of cable operators in Menlo Park". Defendant Menlo Park's Memorandum in Opposition, p. 3 (emphasis in original). Menlo Park claims that it is not attempting to limit to one the number of CTV operators in Menlo Park, but only seeks a "limited right" in a potential natural monopoly market to decline issuing additional franchises until its chosen operator has had the "reasonable opportunity to establish service." *Id.* at 1-2. Of the various weaknesses inherent in Menlo Park's position, the most compelling is that, if this Court finds that the initial restriction violates the first amendment (as we do), Menlo Park's argument is tantamount to claiming that the immediate Constitutional infirmities of its regulation are somehow cured retroactively by a subsequent change in the process that will make it Constitutional at that later time.

community and commercially-leased access channels; and 5) encouraging the development of state-of-the-art cable systems with adequate channel capacity.

II. Standard of Review on a Motion for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Consequently, the "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986) (emphasis in original). The Supreme Court has described the district court's review of the facts as a two-step process. First, the court must determine whether a particular fact is material, that is, a fact that will affect the outcome of the suit under the applicable substantive law. *Id.* " Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Second, if a fact is material, the court must determine if the dispute about the material fact is "genuine," that is, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Accordingly, this Court's initial inquiry must be on the materiality of the various factual questions. In the instant case, the Court must review each of the governmental interests alleged by the Cities and determine which of these, if any, the substantive law recognizes as important or substantial so as to justify the resultant impact on the first amendment rights of potential CTV operators. Only after a determination that an interest is important or substantial can the Court reach the issue

of whether genuine issues of fact exist on the question of whether the franchising process "furthers" that interest.[9]

III. Cable Television and the First Amendment

The United States Supreme Court has left no doubt that a CTV operator is a speaker entitled to first amendment protection. *Preferred II,* 106 S. Ct. 2034, 2037 (1986). The Court did not state, however, the degree of protection to which a CTV operator is entitled or the amount of governmental regulation of that medium permissible under the first amendment. The threshold issue on this motion, therefore, is whether the first amendment allows the government the same wide latitude in regulating the CTV industry as it allows in the broadcast medium, *see Red Lion Broadcasting Co., Inc. v. Federal Communications Commission,* 395 U.S. 367 (1969); *National Broadcasting Co. v. United States,* 319 U.S. 63 (1943), or whether the degree of protection should be closer to that enjoyed by the traditional media, such as newspapers.[10] *See Miami Herald v. Tornillo,* 418 U.S. 241 (1974).

As defendants' lead counsel admitted at oral argument, if this Court were to apply the same degree of protection that more traditional forms of the media receive, the Cities' restriction on access to its residents obviously would violate the first amendment. We recognize that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion,* 395 [U.S.] at 386. Application of a lesser standard of protection, however, is an

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[9] For example, because the law recognizes disruption to the public domain as an important or substantial governmental interest, *see Preferred I,* 754 F.2d 1406, this Court must determine whether genuine issues of fact exist on the amount of disruption that will occur if the Cities' franchising scheme initially allowed access to more than one CTV operator.

[10] As the parties did, the Court will use newspapers as an example of the more traditional forms of public communicators, such as book publishers, public speakers, and pamphleteers, *see Preferred II,* 106 S. Ct. at 2037, that are entitled to a more protective first amendment standard than the broadcasting media.

exception to the rule that must be justified by a particular difference. When the Supreme Court was faced with the question of whether a lesser first amendment standard applied to films, it stated that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule." *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952). Consequently, in developing the first amendment standard to be applied in this case, the question becomes whether there are any differences in the characteristics of the CTV medium that justify a lesser standard of protection for it that would allow a correspondingly greater degree of governmental regulation.

A. Lack of Physical Scarcity in the Cable Television Medium

The Ninth Circuit has recognized that the greater degree of governmental regulation of broadcasting rests on the physical scarcity of radiowaves. *Preferred I,* 745 F.2d 1396, 1403 (9th Cir. 1985), *aff'd,* 106 S. Ct. 2034 (1986). As this Court noted earlier in the instant case, "the electromagnetic spectrum is simply not physically capable of carrying the messages of all who desire to speak over it. This principle has been reaffirmed many times." *Century Federal, Inc. v. City of Palo Alto,* 579 F. Supp. 1553, 1563 (N.D. Cal. 1984) (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 101 (1973); *Red Lion,* 395 U.S. at 389).

Notwithstanding its application to the broadcast medium, the Seventh and D.C. Circuits have expressly concluded that the "physical scarcity rationale" is irrelevant to an evaluation of government regulation of cable television. *Quincy Cable TV, Inc. v. Federal Communications Commission,* 768 F.2d 1434, 1449 (D.C. Cir. 1985) ("[T]he 'scarcity rationale' has no place in evaluating . . . cable television."); *Omega Satellite Products v. City of Indianapolis,* 694 F.2d 119, 127 (7th Cir. 1982) ("[F]requency interference [is] a problem that does not arise with cable television.").

The opinions from these two Circuits strongly suggest that physical scarcity could never arise in a cable television setting. The Ninth Circuit, however, expressly left open the question of how a municipality should "allocate access to poles and conduits to competing cable systems when these structures are incapable of accommodating all those seeking access," because plaintiff had alleged that space was available and the court assumed that fact to be true. *Preferred I,* 754 F.2d at 1404.

In any event, this Court also finds it unnecessary to address the issue of whether physical scarcity could ever arise in the CTV medium because defendants admit that there is no physical scarcity in the instant case.[11]

Consequently, the characteristic in broadcasting that justifies increased governmental intrusion in that medium is absent in the instant case.

B. Natural Monopoly as a Justification

Most of the argument on the instant motion centered around whether the natural monopoly or economic scarcity rationale justified a greater degree of government regulation than allowed in a newspaper context. Although the Ninth Circuit in *Preferred I* briefly commented "[i]n passing" on the natural monopoly argument, it did not decide the issue because the court accepted as true plaintiff Preferred's allegation on the economic feasibility of competition for cable services in the Los Angeles area. *Id.* The court seemed to imply, however, that a natural monopoly would not be a justification for exclusive franchising. *See Central Telecommunications, Inc. v. TCI Cablevision, Inc.,* 800 F.2d 711, 716 (8th Cir. 1986) (interpreting the Ninth Circuit's decision as implying this conclusion).

In the instant case, the issue must be confronted because the parties have hotly contested the question of whether the CTV market in the proposed service areas is a natural monopoly. The Cities envision a trial on this economic question, with both sides presenting expert testimony, based upon studies and

[11] The defendants made no significant argument in favor of the physical scarcity in their briefs, and their lead counsel admitted at oral argument that none in fact existed in this case. Tr. at 21:21-22.

statistics, opining on the likelihood that the relevant market is a natural monopoly. According to the defendants, if the trier of fact finds that there is a reasonable likelihood that the market is a natural monopoly, then the Cities should be able to institute their franchising scheme.

Before determining whether there is a triable issue of fact on the question, however, this Court must first decide whether the question is material under applicable substantive law. Defendants concede that if this Court decides that the law applicable to newspapers controls in this case, then the natural monopoly issue is immaterial and cannot defeat plaintiff's motion.

The Cities' argument on the materiality of the natural monopoly rationale is basically as follows: because the CTV market in our service area is a natural monopoly, it shares a characteristic analogous to the physical scarcity trait in the broadcasting medium, which results in an inherent limitation on the number of possible speakers. Such a trait warrants government regulation of the number and identity of the speakers, which ensures the enhancement of first amendment values.

The Supreme Court rejected this economic scarcity rationale in the context of newspapers, however, in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974). In striking down a Florida statute that required newspapers to print replies of persons subjected to editorials that assailed their character, the Court rejected the suggestion that purely economic constraints on the number of newspaper voices available in the given community justified otherwise unwarranted intrusions into first amendment rights. *Id.* at 247-56. This Court is convinced that the first amendment mandates the same conclusion in the instant case.

This Court recognizes that newspapers, the most traditional form of the media, are historically the source of most of the debate on politics and government that lies at the core of first amendment values. *Id.* at 257-58. Yet, just as a "newspaper is more than a passive receptacle or conduit for

news, comment, and advertising," *id.* at 258, the Supreme Court has stated that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *Preferred II,* 106 S. Ct. at 2037 (quoting *Federal Communications Commission v. Midwest Video Corp.,* 440 U.S. 689, 707 (1979)); *see also Preferred I,* 754 F.2d at 1410 n.10 (recognizing that although CTV operators do transmit programs produced by others, they do exercise considerable editorial discretion). Although the Supreme Court stopped just short of equating cable television to more traditional forms of the media, *see Preferred II,* 106 S. Ct. at 2037, the D.C. Circuit has concluded that there is no "meaningful 'distinction between cable television and newspapers.' " *Quincy,* 768 F.2d at 1450 (quoting *Home Box Office, Inc. v. Federal Communications Commission,* 567 F.2d 9, 46 (D.C. Cir. 1977)). This Court agrees that "the analogy [of cable television] to more traditional media is compelling." *Quincy,* 768 F.2d at 1450.[12]

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[12] The *Quincy* court noted the findings of two influential commissions that have reached the same conclusion, quoting one as finding that "[c]able television, by freeing television from the limitations of radiated electro-magnetic waves, creates . . . a situation more nearly analogous to that of the [print] press." 768 F.2d at 1450 (quoting SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 92 (1971)).

Once we get beyond the difference in the burden to the public domain, the Court finds no constitutionally significant distinction between the content and form of the messages delivered by the CTV medium and newspapers. A CTV operator communicates nearly the same variety of information as the *New York Times,* including general news and political commentary on local, state, national, and international issues, religious programming, and entertainment and educational shows. Although most cable programming today is not originated by CTV operators, they exercise the same editorial discretion as the newspaper editors who decide which nationally syndicated columnists to publish. Certainly, a newspaper would not receive less first amendment protection because it published only syndicated columnists and wire stories. Finally, the very RFP at issue in this case evidences a trend toward greater operator involvement in original programming, listing "operator-originated programming" as one of the five types of services that a potential franchisee must be capable of providing. The RFP envisions the franchisee as supplying a fully-equipped broadcast studio and two to three small-scale mobile production units to facilitate the operator's own (and other community-based) programming.

Not all Circuits have agreed with the D.C. Circuit's conclusion that the reasoning in *Miami Herald* applies to render the natural monopoly rationale irrelevant in the cable television context. *Quincy,* 768 F.2d at 1450; *Home Box Office,* 567 F.2d at 46. Defendants cite the Seventh, Eighth, and Tenth Circuits in support of their position that the existence of a natural monopoly is a basis for the limitations on access that the Cities seek to impose. *Central Telecommunications, Inc. v. CI Cabletelevision, Inc.,* 800 F.2d 711 (8th Cir. 1986); *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981), *cert. denied,* 456 U.S. 1001 (1982). This Court finds these decisions unpersuasive, however, because each lacks a thorough analysis on the relationship between the proposed regulation and the characteristics of the CTV medium, which analysis we believe is now mandated. *See Preferred II,* 106 S. Ct. at 2038.

The most extended discussion of the issue was that of the Tenth Circuit in *Community Communications,* 660 F.2d at 1376-79. The Tenth Circuit distinguished *Miami Herald* by tying the natural monopoly characteristics of the CTV medium to the burden a cable system causes on public utility facilities and streets. Noting that the economic scarcity in *Miami Herald* was "unrelated to the disruptive use of the public domain requiring a government license," *id.* at 1379, the court found that, in contrast, a CTV operator "must significantly impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information." *Id.*

The weakness in the Tenth Circuit's reasoning stems from the lack of a link between a distinctive characteristic of cable television, *e.g.,* the disruption to the public domain, and the proposed government regulation. The fact that a CTV system can potentially disrupt the streets might justify certain government regulations aimed at minimizing such disruption. As the Ninth Circuit noted, however, "[the Tenth Circuit's] statement

is too broad. It suggests that simply because cable's disruption of the public domain gives rise to a need for licensing, it would also justify the monopoly the City seeks to create by its auction process." *Preferred I,* 754 F.2d at 1405.

The Seventh Circuit's opinion in *Omega* is similarly unpersuasive. The court acknowledged that "while today most newspaper markets are natural monopolies, no one thinks that entry into those markets could be regulated without creating profound First Amendment problems." *Omega,* 694 F.2d at 128. Nevertheless, the court summarily concluded that the "apparent natural monopoly characteristics of cable television provide . . . an argument for regulation of entry." *Id.* at 127-28. The opinion was devoid of any reason why such a characteristic should make any difference in the cable television setting when it does not in the newspaper context.[13] Indeed, the court did not appear to take a definitive stand on the issue, citing the Tenth Circuit in *Community Communications* and concluding only that "[p]robably there are enough differences between cable television and the nontelevision media to allow more government regulation of the former." *Id.* at 128.

Finally, while this motion was under submission, the Cities cited to this Court the recent Eighth Circuit decision in *Central Communications,* 800 F.2d 711. That case involved an existing franchised CTV operator's effort to prevent the city from granting a new exclusive franchise to a competing company. The Eighth Circuit held that the natural monopoly characteristics of defendant city's cable market justified the city's granting of a de facto exclusive franchise to a single CTV operator. *Id.* at 717. After reviewing the Supreme Court's *Preferred II*

[13] Other than the natural monopoly theory, the court also briefly noted the public disruption argument, *Omega,* 694 F.2d at 127, and the fact that television in general enjoys "universal access to the home," which results in a "felt need to protect children." *Id.* at 128. Again, the court did not link these characteristics to the regulation of the entry of CTV operators.

opinion,[14] the court cited and discussed the *Community Communications* and *Omega* decisions in support of the proposition that cable television is more analogous to broadcasting than newspapers, therefore justifying an exclusive franchising scheme.[15] Although "recogniz[ing] that there are profound first amendment implications inherent in the regulation of cable operators," *id.* at 716, the Eighth Circuit similarly failed to explain why a CTV operator should receive less first amend-

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[14] The Eighth Circuit read the Supreme Court's opinion as "suggest[ing] that the cable medium may be distinguished from the newspaper medium and that more government regulation of a cable medium may be permissible because cable requires use of public ways and installation of cable systems may disrupt public order." *Central Telecommunications,* 800 F.2d at 714. This Court reads *Preferred II* as definitely holding only that the CTV medium may be distinguishable from the newspaper medium *because* of the greater disruption to the public domain that can result with the former. The Supreme Court in fact did not suggest that the fact that cable television might disrupt public resources somehow justifies government regulation unrelated to this characteristic.

[15] The Eighth Circuit's opinion lacks any discussion of the D.C. Circuit's clear position to the contrary enunciated in *Home Box Office,* 567 F.2d 9, and *Quincy,* 768 F.2d 1434. In fact, *Central Telecommunications* incorrectly implies that the D.C. Circuit's position is in accordance with the Seventh and Tenth Circuits. The court cites Tele-communications of Key West v. United States, 757 F.2d 1330 (D.C. Cir. 1985), as support for the proposition that "[t]he apparent natural monopoly characteristics of cable television . . . provide an argument for regulation of entry." *Central Telecommunications,* 800 F.2d at 716 (quoting *Omega,* 694 F.2d at 126-27). In fact, the issue of natural monopoly was never raised in the *Key West* opinion. In a parenthetical, the Eighth Circuit characterizes the *Key West* decision as "[h]olding that if cable company could show that there were no practical reasons why two cable operators could not serve Air Force base, Air Force's exclusive franchising scheme would violate the first amendment." *Id.* at 716 (citing *Key West,* 757 F.2d at 1338). This Court reads "practical reasons" as referring to circumstances such as the physical burden on the Air Force base, not to market conditions. *See Key West,* 757 F.2d at 1335-36.

ment protection than a newspaper. Cautioning that it would not decide any question not squarely before it, the court considered the natural monopoly question "only in terms of the competing technologies offered" by the two competing CTV operators in the case. *Id.* at 716-17. The court then noted that the defendant cable company proposed to provide a more technologically advanced system with far more channels at a lower cost than plaintiff was currently providing. *Id.* at 717. Therefore, although plaintiff had "a first amendment interest in remaining as a cable television 'speaker'," defendant's "proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming obtainable." *Id.*

Like the Seventh and Tenth Circuits, the Eighth Circuit did not explain which characteristics of the CTV medium justify application of less protection than afforded to the nonbroadcasting media. Clearly, the first amendment will not tolerate the government's suppression of speakers, even on a content-neutral basis, in the newspaper, movie, and book industries on the ground that the one speaker granted access provides the greatest variety of articles, movies or publications at the lowest price. It is also clear under *Miami Herald* that the fact that the newspaper, movie or book markets in a given community are a natural monopoly does not justify greater governmental regulation of such first amendment speakers.

In an age when most people receive their daily news via the television, that medium has established a role as critical to the free flow of ideas and information in this society as any of the more traditional media. The physical scarcity that justified the government's unparalleled intrusion into the broadcasting medium simply does not exist in this case. The Supreme Court has always stressed that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it. . . ." *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557 (1975). As a result, a particular characteristic of a given form of expression can only justify government regulation aimed at addressing that particular characteristic.

Although the fact that cable television places a heavier burden on the public domain than more traditional forms of the media may justify some government regulation of that burden, the defendant Cities as a matter of law have failed to persuade this Court that there are any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.

IV. Application of the O'Brien Test

Concluding that the allowable degree of governmental regulation is not fixed by physical or economic scarcity does not mean that all regulation of CTV operators is invalid. *Preferred I,* 754 F.2d 1396, 1405 (9th Cir. 1985), *aff'd,* 106 S. Ct. 2034 (1986). The first amendment allows some government regulations of noncommunicative aspects of speech. *Id.* As the Supreme Court has noted, "where speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Preferred II,* 106 S. Ct. 2034, 2038 (1986) (citing *Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 805-07 (1984); *United States v. O'Brien,* 391 U.S. 367, 376-77 (1968)).

The propriety of governmental regulations of noncommunicative aspects of speech is judged by the standard enunciated in *United States v. O'Brien,* 391 U.S. 367.[16] Under

[16] The parties disagreed as to what the appropriate test should be in this case. The Court notes, however, that *O'Brien* was applied by the Ninth Circuit in *Preferred I,* 754 F.2d at 1405-07, and cited by the Supreme Court in *Preferred II,* 106 S. Ct. at 2038. Additionally, plaintiff argued that the *O'Brien* test was inappropriate because the RFP process was not content-neutral. We hold for the purposes of this motion only that the regulation at issue is applied in content-neutral fashion, but note the Ninth Circuit's finding that "allowing only a single company selected through the franchise process to erect and operate a cable system in the region. . . creates a serious risk that city officials will discriminate among cable providers on the basis of the content of, or views expressed in, their proposed programs." *Preferred I,* 754 F.2d at 1406. This in fact appears to be the basis upon which the Ninth Circuit found that the *O'Brien* test was not met. *See id.* at 1406-07.

the *O'Brien* test, a regulation is constitutional only if (1) it is within the constitutional power of the government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free speech; and (4) the incidental restriction on first amendment freedom is no greater than essential to further that interest. *O'Brien,* 391 U.S. at 377. The defendant Cities bear the burden of proving that the elements of this test are satisfied. *Preferred I,* 754 F.2d at 1406 n.9; *Playtime Theaters, Inc. v. City of Renton* 748 F.2d 527, 535 (9th Cir. 1984), *rev'd on other grounds,* 106 S. Ct. 925 (1986).

To reiterate, the only government regulation addressed on this motion is that part of the Cities' franchising process that limits to one the number of CTV operators given access to the facilities necessary to install a cable system.

As to the first step of the *O'Brien* test, this Court finds that, as a matter of law, a franchise arrangement is within the Cities' constitutional power of government.[17] Because the second step, whether the regulation furthers an important or substantial governmental interest, is determinative on the instant motion, the Court finds it unnecessary to reach a decision on whether there are genuine issues of material fact under the third and fourth steps.

As noted earlier, the Cities have alleged five interests to satisfy the second step of the *O'Brien* test: (1) minimizing disruption of the public domain; (2) promoting first amendment values by ensuring that their residents receive CTV service from that operator who will provide the most reliable and highest quality service; (3) preventing "cream skimming," which is the wiring of only affluent, and therefore more profitable, portions of the franchise area; (4) ensuring community and commercially-leased access channels; and (5) encouraging the development of state-of-the-art cable systems with adequate channel capacity. This Court finds as a matter of law

[17] California Government Code section 53066 expresses a clear legislative intent on the part of the California legislature to delegate government regulation over CTV operators to local governments. *Preferred I,* 754 F.2d at 1413.

that, of these five interests, only the facts underlying the first, disruption to the public domain, are material so as to warrant consideration on this summary judgment motion. As to the last four, none state an important or substantial governmental interest that would justify the severe impact on the first amendment rights of all potential CTV operators except the one given access.[18] It is to these last four alleged interests that the Court will first turn.

These four interests are inherently related to the natural monopoly rationale. Essentially, the Cities argue that if there is a reasonable probability that their service area will economically support only one CTV operator. then they should be able to choose, at the outset, that operator who will provide the highest quality service and use the offer of an exclusive franchise as a plum to bargain for certain concessions, e.g., access channels, that they might not be able to acquire if an operator knew that it would have to compete with other cable providers. The existence of a state-of-the-art CTV operator that provides quality service, including community and commercial access channels, to all areas within their boundaries best ensures, the Cities argue, that the values of the first amendment will be furthered because the Cities' residents will have expanded opportunities to receive diverse sources of information.

The Cities' position is analogous to one taken by municipalities defending antitrust suits by cable operators. They have argued, as cities have successfully done with such industries as water and electricity, that regulation of natural monopolies maximizes economic efficiency, and consequently, consumer welfare. Judge Posner of the Seventh Circuit explains this reasoning in the CTV setting:

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[18] In applying the second step of the *O'Brien* test, the Supreme Court applies a balancing test, asking whether the alleged governmental interest is sufficiently substantial to justify the resultant impact on free expression. *See, e.g.,* Members of the City Council v. Taxpayers for Vincent, 104 S. Ct. 2118, 2129 (1984).

The Cities argued these same alleged interests in their amicus brief to the Ninth Circuit in *Preferred I,* to which the court responded in a footnote: "We are not convinced that restricting the number of cable operators in the manner set forth in . . . [Preferred's] complaint furthers these interests in a manner consistent with the First Amendment." 754 F.2d at 1406 n.9.

> "[I]n a 'natural monopoly'...the benefits, and indeed the very possibility, of competition are limited. You start with a competitive free-for-all...but eventually there will be only a single company, because until a company serves the whole market it will have an incentive to keep expanding in order to lower its average costs. In the interim there may be wasteful duplication of facilities. This duplication may lead not only to higher prices to cable television subscribers, at least in the short run, but also to higher costs to other users of the public ways.... An alternative procedure is to pick the most efficient competitor at the outset, give him a monopoly, and extract from him in exchange a commitment to provide reasonable service at reasonable rates."

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 126 (7th Cir. 1982).

The Cities essentially argue that the same is true in the context of the first amendment. Just as the regulation of water and electric companies—or CTV operators as the case may be—enhances consumer welfare through economic efficiency, the regulation of CTV operators furthers the purposes of the first amendment. But in this case, what may foster economic efficiency most certainly inhibits the first amendment.

The paternalistic role in the first amendment that the Cities envision for government is simply inconsistent with the purpose and goals of the first amendment. The Cities nevertheless contend that such a role is consistent with the Supreme Court's often-cited passage that, under the first amendment, it is the rights of viewers and listeners that is paramount, not the rights of speakers. *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 390 (1969). We disagree. In fact, the rationale of the Court is just the opposite. The Court proceeds to explain in *Red Lion* that because the viewers' rights are paramount, "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market...." *Red Lion,* 395 U.S. at 390.

Elsewhere, the Court has explained that the Constitution "command[s] that government itself shall not impede the free flow of ideas...." *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 252 (1974) (quoting *Associated Press v. United States,* 326 U.S. 1, 20 (1945)). We reach our conclusion with the first amendment interests of the Cities' residents foremost in mind, for their rights are endangered by a governmental attitude that government knows best how to fine tune the flow of information to which they have access. Furthermore, this Court agrees with the Ninth Circuit in *Preferred I* that such governmental intrusion carries with it the inherent risk of covert discrimination against certain CTV operators. *See supra* note 16.

Consequently, the factual questions presented by the Cities on the above four alleged interests are immaterial under the applicable substantive law, and therefore, cannot give rise to issues of fact that can defeat plaintiff's motion for summary judgment.

The analysis is different, however, on the Cities' first alleged interest, disruption to the public domain. In *Preferred I,* the Ninth Circuit recognized that a "City has legitimate interests in public safety and in maintaining public thoroughfares." *Preferred I,* 754 F.2d at 1406; *see also Community Communications Co. v. City of Boulder,* 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. denied,* 456 U.S. 1001 (1982) ("A city needs control over the number of times its citizens must bear the inconvenience of having its streets dug up and the best times for it to occur.") Additionally, the fact that a cable system burdens public resources is a characteristic of the medium not shared with traditional media such as newspapers. Therefore, even when applying to CTV operators the same first amendment standard applied to newspapers, the allowable governmental regulation must still be viewed in light of those important or substantial governmental interests specifically implicated by the noncommunicative aspects of the CTV medium.

The above finding that, under the applicable substantive law, the Cities have an important or substantial governmental

interest in minimizing disruption to the public domain does not end the inquiry. For purposes of this motion, the Court next must determine whether the Cities have offered sufficient evidence to create a genuine issue of fact on the question of whether the proposed limitation on access "furthers" that governmental interest. *See O'Brien,* 391 U.S. at 377 (the second step is whether the challenged regulation "furthers" an important or substantial governmental interest). That is, have the Cities offered sufficient evidence on the degree of disruption that will result if they initially allow more than one CTV operator to lay cables?

Both sides presented exhaustive evidence on the disruption that results from the installation and maintenance of cable systems, which run underground and on telephone poles. The Cities presented declarations from their experts on everything from the danger posed to other cable lines to the likely increase in the number of complaints the Cities will receive regarding remiss CTV workers who leave backyard gates open for opportunistic family pets.[19]

The Cities made no showing, however, on how much more disruptive granting access to more than one CTV system would be when multiple systems are installed simultaneously as opposed to the installation of a single system. What is at issue here is a facial challenge to a franchising scheme that grants access to the first CTV operator to lay cables within a particular service area. Consequently, the Cities cannot justify a limitation to one on the ground that, in general, a CTV system is disruptive to the public domain. The Cities are willing to allow the installation of the first system. The question must then

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[19] For example, the Cities submit expert declarations stating that the trenching necessary to install a cable system underground carries with it such risks as damaging other utility services, destroying the physical integrity of the road surface in which trenching is performed, injuring vehicles using the streets, delaying resurfacing of the Cities' roadways, adversely impacting local business, interfering with vehicular, pedestrian, and bicycle traffic, and damaging or obstructing property. Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17-18 n.17.

become: how is the government's interest in the public domain effected if access is granted initially to more than one system? To this, the Cities provide no answer.

The Cities address this issue only by arguing that unless two or more CTV systems are installed simultaneously, the disruptive burden will be increased whenever more than one system is constructed within the same service area. *See* Defendants Palo Alto and Atherton's Memorandum in Opposition, pp. 17-18. This may be so. But such a contention is incongruous to the facts of this case because when the RFP was issued no cables had previously been installed, the Cities intended to allow installation of one system, and simultaneous installation of multiple systems was possible. This is not a case in which one system has already been fully installed and another CTV operator subsequently seeks to install another system over the same public domain. If disruption can be minimized by simultaneous installation, then what prevents the Cities from taking advantage of that fact with proper time, place, and manner restrictions? Indeed, plaintiff has stated that requiring simultaneous installation would be a valid government regulation. *See* Plaintiff's Reply Memorandum, pp. 13-14.[20]

Because the Cities have made no showing that initially allowing access to more than one operator will implicate or "further" their important or substantial interest in regulating disruption to the public domain, this Court finds that, as a matter of law, there are no genuine issues of material facts under the second step of the *O'Brien* test.

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[20] We do not express an opinion on the issue of whether the public disruption interest could ever justify the total ban on a particular CTV operator's installation of any of its own cables, but the Ninth Circuit's *Preferred I* opinion seems to suggest that it could not. 754 F.2d at 1406.

V. Conclusion

We have not intended to suggest in this decision, nor do we read the Ninth Circuit's *Preferred I* opinion as holding, that the Cities necessarily have to open their cable facilities to all comers regardless of size, shape, quality or qualifications. *Accord Pacific West Cable Co. v. City of Sacramento,* No. 85-2143, slip op. at 6 (9th Cir. Aug. 20, 1986). We have not needed to reach the issue of permissible minimum requirements that the Cities might impose on all franchisees. This Court only holds on this motion that the Cities have not offered sufficient evidence to create a genuine issue of material fact on the question of whether there is a substantial or important governmental interest to justify limiting to one the number of CTV operators granted access to the facilities necessary for the installation and maintenance of a cable system. Therefore, under the undisputed facts of this case, that part of the Cities' RFP that imposes such a restriction is unconstitutional on its face.

According to the Cities, their entire franchising scheme depended upon limiting initial access to one CTV operator. Therefore, the Court is now unsure as to what, if any, issues in this case are still unresolved other than damages. Accordingly, the Court orders that a status conference in this case be held at 3:30 p.m. on February 4, 1987. The Court further orders that three weeks prior to that date, plaintiff file a status conference statement listing the remaining issues in this case. One week thereafter, the defendant is to file its version of the same status conference statement.

IT IS SO ORDERED.
Dated: December 3, 1986.

/s/ EUGENE F. LYNCH

EUGENE F. LYNCH
United States District
Judge

PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES OF THE PETITIONERS

TELE-COMMUNICATIONS, INC.
(Ownership Indicated by Indentation)

Name	State
CENTRE VIDEO CORPORATION	PA
Allegheny Cablevision, Inc.	PA
Centre Video Corporation of Ohio, Inc.	OH
Centre Video Corporation of West Virginia	WV
COMMUNITY TELE-COMMUNICATIONS, INC.	NV
Alabama T.V. Cable, Inc.	AL
Cablevision of Austin, Inc.	MN
Cablevision of Austin	MN
Columbus CableVision, Inc.	GA
Community Communications Company	CO
Community Realty, Inc.	NV
Community TCI of Kansas, Inc.	KS
Community TCI of Ohio, Inc.	NJ
Miami Valley Cable, Inc.	OH
New Castle Cable Communications, Inc.	IN
Com-West, Inc.	DE
Cableview of Albert Lea, Inc.	MN
Cablevision of Austir	MN
CTCI Cablevision, Inc.	DE
Poughkeepsie Cablevision, Inc.	NY
Pueblo T.V. Power, Inc.	CO
T.V. Power of North County, Inc.	CA
Dodge City CATV, Inc.	KS
Fulton Community Antenna Television Systems, Inc.	IL
Richland Cable System, Inc.	WI

Name	State
Satellite Services, Inc.	DE
SSI 2, Inc.	NV
TCI Cable Management Corporation	CO
TCI Cablevision, Inc.	NV
Twenty CATV, Inc.	GA
EARTH STATIONS, INC.	NV
Cable Communications Equities, Inc.	NV
Milbank-Grant County Development Corporation	SD
LIBERTY TV CABLE, INC.	DE
TCI HOLDINGS, INC.	
Cable Media, Inc.	CO
TCI Media of Albion	PA
TCI Media of Bedford County	PA
TCI Media of Jefferson County	PA
TCI Media of Lake County	OH
TCI Media of Lycoming Valley	PA
TCI Media of McKean County	PA
TCI Media of Moshannon Valley	PA
TCI Media of Somerset County	PA
TCI Media, Inc.	OH
TCI Media of Albion	PA
TCI Media of Central Pennsylvania, Inc.	PA
TCI Media of Eastern Ohio, Inc.	OH
TCI Media of Kent Ravenna, Inc.	OH
TCI Media of Andover, Inc.	OH
TCI Media of Lake Erie, Inc.	OH
TCI Media of Jefferson County	PA
TCI Media of Lycoming Valley	PA
TCI Media of MBS, Inc.	PA
MBS Cable TV, Inc.	OH

Name	State
TCI Media of McKean County.....	PA
TCI Media of Moshannon Valley.....	PA
TCI Media of Northern Pennsylvania, Inc.	PA
TCI Media of Centre County	PA
TCI Media of Mount Union, Inc.	PA
TCI Media of Ridgway, Inc.	PA
TCI Media of Waynesburg, Inc.	PA
TCI Media of West Virginia, Inc.	WV
TCI Media of New York, Inc.	OH
TCI Media of Adirondacks, Inc.	NY
TCI Media of Opennga, Inc.	DE
TCI Media of Bedford County...	PA
TCI Media of Lake County.....	OH
TCI Media Corporation of Pennsylvania.....	PA
TCI Media of Addil, Inc....	OH
TCI Media of the Alleghenies, Inc.....	OH
TCI Media of Cambria County, Inc.	PA
TCI Media of Lake County	OH
TCI Media of Ohio, Inc.	OH
TCI Media of Kiski Valley, Inc.	PA
TCI Media of Pennsylvania, Inc.	PA
TCI Media of Ottawa County, Inc. ...	OH
TCI Media of Port Clinton, Inc..	OH
TCI Media of Somerset County.....	PA

Name	State
Horizon Tele-Communications, Inc.	NV
Athena Communications Corporation	DE
Athena Cablevision Corporation	DE
Athena Cablevision of Corpus Christi, Inc.	TX
Athena Cablevision of Tennessee and Kentucky, Inc.	TN
Tennessee-Kentucky Cable TV Company	TN
Athena Realty, Inc.	NV
Commco Cable Communications Company	TX
COMSEC Corporation	TX
Halifax Cable TV, Inc.	FL
Halifax Cablevision, Inc.	FL
Volusia Cable-Vision Corporation	FL
International Telemeter Corporation	NY
Knox Cable T.V., Inc.	TN
Tennessee-Kentucky Cable TV Company	TN
Texcom, Inc.	TX
Athena Development Corporation	DE
Athena Cablevision Corporation of Knoxville	TN
Schenectady Cablevision, Inc.	NY
Gibson Cable Television, Inc.	IN
Horizon Communications Corporation of Metro-East	IL
Horizon Communications Corporation of Southern Illinois	IL
Horizon Communications Leasing Corporation	KY
TCI HOLDINGS, INC.	CO
Cabletime, Inc.	CO
G.T. Cablevision, Inc.	NV

Name	State
All Channel T.V., Inc.	WI
Complete Channel T.V., Inc.	WI
Cablevision of Jefferson County, Inc.	MO
G.T. Cablevision, Inc. of North Carolina	NC
St. Louis Tele-Communications, Inc.	MO
STL Cablevision Partners	MO
TCI of Maryland, Inc.	MD
TCID of Cablevision, Inc.	NV
Illinois Community Cablevision, Inc.	IL
Tele-Communications of South Suburbia, Inc.	IL
TCI Cablevision of Michigan, Inc.	MI
TCI Central, Inc.	DE
TCI Cablevision of Colorado, Inc.	CO
TCI Cablevision of Oklahoma, Inc.	OK
TCI of Arkansas, Inc.	AR
TCI of Kansas, Inc.	KS
TCI of Louisiana, Inc.	LA
TCI Development Corporation	CO
Buffalo Tele-Communications, Inc.	DE
TCI of Buffalo, Inc.	NY
Cable Security, Inc.	NY
Cable Management Company	DE
Cable Network Television, Inc.	NV
Cable Television of Gary, Inc.	IN
Cablevision Associates of Gary Joint Venture	IN
CATV of Elizabeth, Inc.	NJ
Cable TV Company Ltd.	GA
Scriptel, Inc.	CO
Chesapeake Communications Cablevision Associates	MD
Columbia Satellite System	TX
Community Tele-Communications of South Dakota, Inc.	CO
Sioux Falls Cable Television	SD

Name	State
Country Cable Co.	CO
TKR Cable Company	CO
Enefen Corp.	DE
Hillcrest Cablevision Company	OH
LaSalle Telecommunications, Inc.	IL
Liberty Investments, Inc.	DE
Liberty—CSI, Inc.	CO
Communications Services Inc.	KS
Liberty Florida, Inc.	DE
Orcable Ltd.	OR
Liberty Michigan, Inc.	DE
Greater Media Cablevision of Western Oakland County Limited Partnership	MI
Liberty of Northern Indiana, Inc.	DE
U.S. Cable of Northern Indiana Limited Partnership	IN
Marcus Communications, Inc.	DE
Marcus Communications, Inc.	NV
GWC 73, Inc.	DE
GWC 106, Inc.	DE
Marcus Communications, Inc.	MN
Memphis CATV, Inc.	TN
Miami Tele-Communications, Inc.	FL
Miami Cablevision	FL
Motor City Communications, Inc.	MI
TCID Cable Management of Detroit, Inc.	MI
Pittsburgh Tele-Communications, Inc.	PA
Mahoning Valley Cablevision, Inc.	OH
TCI Cable Theatre, Inc.	NE
TCI of D.C., Inc.	DC
District Cablevision	DC
TCI Development Programs, Inc.	NV
TCI Information Services, Inc.	NV
X*PRESS Information Services	CO
TCI Productions, Inc.	NV

Name	State
TCI Sports, Inc.	NV
TCID Network of Delaware, Inc.	DE
TCID Networks of Minnesota, Inc.	MN
Cable Value Network	MN
TCID of Arizona, Inc.	AZ
TCID of Buffalo, Inc.	NY
TCID of Carson, Inc.	CA
Carson Cable Television Company Joint Venture	CA
TCID of Chesapeake, Inc.	VA
TCID of Chicago, Inc.	IL
Communications & Cable of Chicago, Inc.	IL
TCID of Denver, Inc.	NV
TCID of Florida, Inc.	FL
Gulfstream Cablevision of Pasco County	FL
TCID of Greenwich, Inc.	CO
TCID of Michigan, Inc.	NV
Bresnan Communications Company	MI
TCID of Missouri, Inc.	MO
Kansas City Cable Partners	CO
TCID of Montana, Inc.	MT
Vigilante Satellite Services	SD
TCID of Paterson, Inc.	NV
US Cable of Paterson	NJ
TCID of Puerto Rico, Inc.	NV
TCID of South Chicago, Inc.	IL
South Chicago Cable, Inc.	IL
Tele-Communications Cable Company	CO
TCI-Taft Cablevision Associates	CO
American Microwave & Communications, Inc.	MI
Four Flags Cable TV	MI
Four Flags Cablevision	MI
Muskegon Cable TV Co	MI

Name	State
Robert Fulk, Ltd.	DE
Four Flags Cable TV	
Four Flags Cablevision	
Muskegon Cable TV Co	
Waltham Tele-Communications	MA
Waltham Tele-Communications Inc.	CO
Taft-TCI Programs	OH
Tele-Communications Dominicana, Inc.	DE
Tele-Communications Investments, Inc.	CO
Cable T.V. of Minot, Inc.	ND
Communications Investments, Inc.	CO
Glendive Cable T.V.	MT
Silver Spur Land and Cattle Co.	WY
Bob Magness, Inc.	WY
Upper Valley Telecable Company, Inc.	ID
Tele-Communications Puerto Rico, Inc.	DE
Tele-Mont Communications Cablevision Associates	MD
Telenois, Inc.	IL
Cablenet Associates	IL
Vigilante Satellite Services	SD
Western Satellite, Inc.	NV
Airway Heights Cable Television, Inc.	WA
Davenport Cable Television, Inc.	WA
Deer Park Cable Television, Inc.	WA
Wilbur Cable Television, Inc.	WA
Western Satellite 2, Inc.	CO
TCI Sports	UT
Western TCID, Inc.	OR
West Suburban Tele-Communications, Inc.	MA
TCI East, Inc.	DE
TCI Cablevision of Massachusetts, Inc.	MA

Name	State
TCI Cablevision of New Hampshire, Inc.	NH
TCI Cablevision of Vermont, Inc.	VT
TCI of Delaware, Inc.	DE
TCI of Maine, Inc.	ME
TCI of Rhode Island, Inc.	RI
TCI of Virginia, Inc.	VA
TCI Growth, Inc.	NV
Alda Communications Corporation of Pennsylvania	PA
Southeastern Cablevision Company..	PA
Brookside Antenna Company	OH
Cable Delaware Ltd.	DE
Cable Finance Corporation	DE
Cable Information Services, Inc.	DE
Alpena Cablevision, Inc.	MI
Hobbs Cablevision, Inc.	NM
Jal CATV Corporation	NM
Logan Cablevision, Inc.	WV
L-B Cablevision, Inc.	WV
Marion Cablevision, Inc.	DE
Carbondale Cablevision, Inc.	IL
Cable Information Systems of Brunswick, Inc.	OH
Cable Investments, Inc.	DE
Brazoria Cablevision, Inc.	TX
Brazoria Cablevision Associates	TX
Standard Communications Associates, Inc.	DE
G-F Cable T.V., Inc.	ND
Madison Communications, Inc.	DE
Island Cable Company	NJ
Madison Cablevision, Inc.	DE
St. Albans Cablevision, Inc.	DE
Video Design Cable Televison	FL

Name	State
Central CATV, Inc.	IN
Plains-Indiana, Inc.	DE
Clearview Cable TV	
Total Cable TV of Delphi, Inc.	IN
Total Cable TV of Fowler, Inc.	IN
Total Communications Cable Company, Inc.	IN
Crest Communications, Inc.	KS
Newton Cable TV, Inc.	KS
Satellite Communications Services, Inc.	KS
Green Country Cable of Haskell, Incorporated	OK
H.C. Ostertag Cable Television Co., Inc.	PA
Joseph S. Gans, Inc.	PA
Micro-relay, Inc.	DE
Missouri State Cable, Inc.	MO
Muskingum County Cable Television, Inc.	OH
Orangetown Cablevision, Inc.	NY
PCNH, Inc.	DE
Rockland Information Systems, Inc.	NY
Good-Vue CATV, Inc.	NY
Salem Cablevision, Inc.	IN
Schiavone Communications of Pennsylvania, Inc.	PA
Southeastern Cablevision Company	PA
SEE TV Co.	MO
Susquehanna CATV, Inc.	PA
West Shore TV Cable Co.	PA
TCI Cablevision of Georgia, Inc.	GA
GWC 54, Inc.	DE
GWC 91, Inc.	DE
GWC 95, Inc.	DE
GWC 100, Inc.	DE
TCI Cablevision of Minnesota, Inc.	MN
GWC 7, Inc.	DE

Name	State
GWC 18, Inc.	DE
TCI Cablevision of New Mexico, Inc.	NM
GWC 24, Inc.	DE
TCI Cablevision of Texas, Inc.	TX
GWC 29, Inc.	DE
Southwest Video Corporation	TX
TCI Cablevision of Wisconsin, Inc.	WI
TCI Cablevision of Wyoming, Inc.	WY
TCI Growth, Inc.	CO
TCI of Illinois, Inc.	IL
GWC 74, Inc.	DE
TCID of Suburban Chicago, Inc.	IL
Lakes Cablevision, Inc.	DE
Nico Cable, Inc.	IL
TCI of Iowa, Inc.	IA
TCI of New Jersey, Inc.	NV
GWC 69, Inc.	DE
GWC 102, Inc.	DE
GWC 105, Inc.	DE
TCI of New York, Inc.	NY
GWC 69, Inc.	DE
GWC 102, Inc.	DE
TCI of North Dakota, Inc.	ND
TCI of South Carolina, Inc.	SC
GWC 34, Inc.	DE
TCID of Texas, Inc.	TX
Tele-Ception of Winchester, Inc.	KY
Trans-Muskingum, Incorporated	WV
Ulster County CATV, Inc.	NY
Kingston CATV, Inc.	RI
Kingston Cablevision, Inc.	NY
Video Design Cable Television	FL
Wayne County CATV, Inc.	IN
Clearview Cable TV	
TCI Holdings II, Inc.	CO
Group W Cable, Inc.	NY

Name	State
TCI North Central, Inc.	DE
TCI Cablevision of Nebraska, Inc.	NE
TCI Cablevision of South Dakota, Inc.	SD
TCI Northeast, Inc.	DE
TCI Cablevision of Ohio, Inc.	OH
TCI of Pennsylvania, Inc.	PA
TCI of West Virginia, Inc.	WV
TCI Southeast, Inc.	DE
TCI Cablevision of Alabama, Inc.	AL
TCI Cablevision of Florida, Inc.	FL
TCI Cablevision of Kentucky, Inc.	KY
TCI Cablevision of North Carolina, Inc.	NC
TCI of Indiana, Inc.	IN
TCI of Mississippi, Inc.	MS
TCI of Tennessee, Inc.	TN
TCI West, Inc.	DE
Liberty Communications, Inc.	OR
GWC 23, Inc.	DE
Billings Tele-Communications, Inc.	OR
Liberty Television, Inc.	OR
Liberty Broadcasting, Inc.	OR
Nation Wide Cablevision, Inc.	DE
Nation Wide Cabevision, Inc.	CA
Peninsula Cable Television Corporation of Menlo Park	CA
GWC Microwave, Inc.	DE
TCI Cablevision of Arizona, Inc.	AZ
TCI Cablevision of California, Inc.	CA
GWC 93, Inc.	DE
Peninsula TV Power, Inc.	CA
Peninsula Cable Television Corporation of San Mateo	CA
Sierra Communications Systems, Inc.	CA
TCI Pacifica Corp.	DE
Brisbane Cable TV, Inc.	CA

Name	State
Crystal-Brite Television, Inc	CA
Fremont Cable T.V., Inc.	CA
Vista Grande Cablevision, Inc. .	CA
TCI Cablevision of Montana, Inc.	MT
GWC 33, Inc.	DE
GWC 44, Inc.	DE
GWC 55, Inc.	DE
TCI Cablevision of Utah, Inc.	UT
Community Television of Utah, Inc.	NV
Ruti-Sweetwater, Inc.	DE
Davis County Cablevision, Inc.	UT
Wasatch Community T.V., Incorporated	UT
Utah Satellite Company.....	DE
TCI Cablevision of Washington, Inc.	WA
GWC 47, Inc.	DE
GWC 92, Inc.	DE
GWC 103, Inc.	DE
GWC Auburn, Inc.	DE
GWC Seattle, Inc.	DE
TCI of Idaho, Inc.	ID
GWC 47, Inc.	DE
GWC 66, Inc.	DE
TCI of Nevada, Inc.	NV
GWC 93, Inc.	DE
GWC 72, Inc.	DE
Wells TV, Inc.	NV
TCI of Oregon, Inc.	OR
TV Pix, Inc.	NV
TCI UA, Inc.	DE
United Artists Communications, Inc.	MD
Black Entertainment Television, Inc.	DC
Cable Education Network, Inc.	MD
Cencom Cable of Associates, Inc.	DE
Cencom of Kentucky	KY

Name	State
Concom of Missouri I	MO
Concom of Missouri II	MO
Cencom of Missouri III	MO
Cencom of North Carolina	NC
Cencom of South Carolina	SC
Columbia Associates L.P.	DE
C.O.M.B. Co.	MN
C.O.M.B. T.V. Co.	MN
Cable Value Network	MN
Daniels & Associates Partners Limited	CO
Mile Hi Cablevision Associates, Ltd.	CO
Gulfstream Cablevision of Pinellas County, Inc.	FL
Lenfest Communications, Inc.	DE
Lebananon Valley Cable TV Co., Inc.	PA
Suburban Communications, Inc.	PA
Suburban Pottstown Cable TV Co.	PA
Big Sky Community TV, Inc.	MT
Metro Cable Corporation	CO
Mont-Sat Cable, Inc.	MT
Skyview TV, Inc.	MT
Village Cable, Inc.	SD
Western Community TV, Inc.	MT
WSS Cable TV, Inc.	MT
Portel Services Network Limited Pt.	CT
Taft-TCI Satellite Services, Inc.	CO
Tablecable Nacional, CXA	DE
Telecrafter Corporation	DE
Data Cable Corporation	DE
X*PRESS Information Services	CO
Telecrafter Services Corporation	DE
Tele-Matrix	NV
Televents Group, Inc.	NV
Turner Broadcasting System, Inc.	GA
United Cable Television Corporation	DE

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No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TCI CABLEVISION, INC.,
COMMUNITY TELE-COMMUNICATIONS, INC.,
and TELE-COMMUNICATIONS, INC.,
Petitioners,

v.

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE MEDIA INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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January 14, 1987

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MOTION OF THE MEDIA INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Media Institute ("the Institute") hereby respectfully moves for leave to file the attached brief amicus curiae in support of the petition for writ of certiorari in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

The Institute's interest in this case rises from the significant First Amendment issue raised by the decision below—whether a municipality can, consistent with the

First Amendment, issue an exclusive franchise for the provision of cable television services that excludes all other cable system operators.

The Institute is a not-for-profit, tax-exempt research organization supported by a wide range of foundations, corporations, associations and individuals. It is dedicated to the improvement of business and economic news coverage and to a robust, competitive and unfettered press. It sponsors various programs relating to new communications technologies, communications policy and First Amendmendent issues and publishes studies, books and periodicals on these issues. It has also participated through friend-of-the-court briefs in significant legal cases affecting these issues.

The decision of the United States Court of Appeals for the Eighth Circuit in this case will have a significant impact on the First Amendment rights of cable system operators and viewers of cable television programming throughout the country. The participation of the Institute as amicus curiae will permit a fuller and more complete analysis of the First Amendment issues raised.

Respectfully submitted,

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January 14, 1987

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE MEDIA INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Media Institute ("the Institute"), a not-for-profit, tax-exempt research organization, is dedicated to the improvement of business and economic coverage and to a robust, competitive and unfettered press.[1] The issue decided in this case by the United States Court of Appeals for the Eighth Circuit—whether a municipality's grant of an exclusive cable franchise is prohibited by the First

---

[1] The Institute sponsors various programs related to business/media relations, new communications technologies, communications policy, and First Amendment issues, and publishes studies, books, and periodicals on media-related topics. In addition, it participates through friend-of-the-court briefs in significant legal cases affecting these interests.

Amendment—is thus of considerable concern to the Institute. The Institute submits that the decision below is erroneous in concluding, on the record in this case and the current state of economic knowledge, that the provision of cable television services in Jefferson City was in fact a natural monopoly. Since that finding is critical to the court's conclusion that Jefferson City could award an exclusive franchise consistent with the First Amendment, and establishes an erroneous precedent with widespread ramifications for the First Amendment rights of cable system operators and viewers, the decision below is fatally flawed and must be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case, arising from an all-too-common dispute over the municipal award of an exclusive cable television franchise, raises a significant issue concerning the First Amendment rights of cable system operators and viewers. A judgment of the District Court for the Western District of Missouri (reported at 610 F. Supp. 891 (W.D. Mo. 1985)) incorporated a jury verdict against petitioners TCI Cablevision, Inc. and affiliated companies (collectively, "TCI") and in favor of respondent Central Telecommunications, Inc. ("Central"), a disappointed applicant for the cable television franchise to be awarded by Jefferson City, Missouri ("the City"). The jury found that TCI, the existing holder of the City's cable television franchise, had violated the federal antitrust laws and tortiously interfered with Central's business expectancy, and awarded Central damages of approximately $36 million. The U.S. Court of Appeals for the Eighth Circuit subsequently affirmed this judgment. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986).

2. In affirming the jury verdict, the Eighth Circuit rejected TCI's argument that it had a right guaranteed by the First Amendment to offer cable television service with or without a franchise from the City, and that, as a result, Central could not have been damaged by its failure to receive an exclusive franchise. Instead, the

court concluded that "the 'natural monopoly' characteristics of the Jefferson City franchise justified the City in offering a de facto exclusive franchise." 800 F.2d at 717.

3. This conclusion is inconsistent with the First Amendment's guarantee of a free press and must be reversed. As this Court recognized last year in *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986), the activities of cable television system operators (and viewers) "plainly implicate First Amendment interests." *Id.* at 2037. Given such protected interests, an exclusive cable franchise, which precludes all but one cable system operator from communicating with the viewing public, raises significant concerns. The abridgement of First Amendment rights resulting from a grant of an exclusive franchise cannot be justified here by the claim of a "natural monopoly" resulting from economic conditions.

4. The factual record below does not support the court's conclusion that cable television in Jefferson City is a "natural monopoly," and economic theory suggests that no such "natural monopoly" exists. Rather, both the existing record and the likely result of any economic analysis would support the opposite conclusion—that cable television in Jefferson City is not inevitably monopolistic and indeed is only a part of an intensely competitive entertainment and information market. The First Amendment thus clearly forbids the exclusion of TCI or any other cable operator from disseminating programming and competing for viewers in Jefferson City or any other community.

5. Even if Jefferson City, for some reason not apparent on the record, proved to be a market that would support only a single provider of cable television services, the First Amendment bars a governmental choice of the only cable speaker. The district court's conclusion, approved by the court of appeals, that "since only one competitor can survive in the market, it makes sense to allow the local government to choose the best applicant" (800 F.2d at 714) is thus fundamentally inconsistent with the

First Amendment. If there is to be only one cable operator in a community, the First Amendment requires that choice be made by the citizens of the community functioning as purchasers in the marketplace, not by municipal fiat.

6. In rejecting TCI's First Amendment right to operate a non-exclusive cable franchise, the Eighth Circuit failed to undertake an independent review of the record supporting its natural monopoly conclusion. As this Court has repeatedly recognized, the importance of preserving constitutional rights requires that decisions regarding entitlement to such protection cannot be left merely as questions for the trier of fact. An "independent examination of the whole record" by the reviewing court is required before approving a limitation of free expression. Such a review was lacking below.

7. Because the Eighth Circuit's decision subjugates important First Amendment rights to a municipal government's desire to select a particular cable television operator as the sole provider of cable services, it cannot be allowed to stand. Such a limitation on the First Amendment rights is contrary to prior decisions of this Court and is inconsistent with recent decisions of other circuits. If the Eighth Circuit's decision is not reversed, it will have an impact well beyond the boundaries of this case. Cable television and other new technologies are growing in importance as means of disseminating news, information and entertainment. The Eighth Circuit's decision will significantly deter the development of cable systems and other new technologies as alternative voices, protected by the First Amendment to the same extent as the more traditional methods. The petition for certiorari should therefore be granted and the judgment below reversed.

ARGUMENT

I. The Justifications For an Exclusive Francise Offered by the Eighth Circuit Are Insufficient to Overcome the First Amendment's Protections.

Despite its recognition that "there are profound first amendment implications inherent in the regulation of cable operators" (800 F.2d at 716), the Eighth Circuit concluded that cable television in Jefferson City was a natural monopoly and that the City could award an exclusive cable franchise. *Id.* at 717. It is beyond dispute that the activities of cable system operators and viewers are protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2036 (1986). Although this Court in *Preferred* reserved decision on the precise contours of that First Amendment protection,[2] the approach taken by the Eighth Circuit is plainly inconsistent with the First Amendment and with prior decisions of this Court. Because of the current confusion regarding the application of the First Amendment to the activities of cable system operators[3] and the conflict with the decisions of other circuit courts,[4] the petition for certiorari should be granted.

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[2] *See* 106 S. Ct. at 2038 ("We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised . . . without a fuller development of the disputed issues in this case.").

[3] For example, in a decision issued after the Eighth Circuit's decision in this case, the U.S. District Court for the Northern District of California rejected an attempt by a municipality to issue an exclusive cable television franchise and held that the full protection of the First Amendment is available to cable speakers because "cable television is more closely analogous to newspapers than the broadcast media." *Century Federal, Inc. v. City of Palo Alto*, No. 85-2168, slip op. at 2, 20-23 (N.D. Cal. Dec. 3, 1986).

[4] Both the Ninth and the D.C. Circuits have recognized a more expansive scope of First Amendment protection for the activities of cable system operators than that afforded by the Eighth Circuit here. *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401-02 (9th Cir. 1985), *aff'd on other grounds*, 106 S. Ct. 2034 (1986); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

The Eighth Circuit offered two reasons for rejecting TCI's First Amendment claims:

> First, the evidence reveals that TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly originally gained through the grant of a de facto exclusive franchise. Second, the evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time. Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market.

800 F.2d at 717. Apart from the inherent contradiction in the court's reasoning (*i.e.*, that an award of an exclusive franchise will promote competition), neither of these rationales provides a supportable basis for abridging TCI's First Amendment right to operate a cable system in Jefferson City. First, even assuming the court's characterization was accurate,[5] TCI's "sincerity" or the lack of it regarding its willingness to operate a non-exclusive cable franchise is simply not relevant to any First Amendment analysis.[6] It is equally clear that an alleged "natural monopoly" arising solely from economic conditions does not permit governmental regulation of the number of cable speakers.

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[5] *See* pages 13-14 *infra*.

[6] It is an essential principle of First Amendment analysis that entitlement to this constitutional protection does not depend upon a court's, the government's or society's assessment of the character of the speaker. *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments has a firmer foundation than the whims or personal opinions of a local governing body"). Even if the facts of this case do not present TCI in the most sympathetic light, to the extent that the court's assessment of the relative characters of the competing applicants for the cable franchise influenced its analysis of the First Amendment issue, it was clearly inappropriate.

A. First Amendment Rights May Not Be Abridged By a Claim of "Natural Monopoly" Arising Solely From Economic Conditions.

The "natural monopoly" theory relied on by the Eighth Circuit was summarized as follows:

> [T]his grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation. The theory is that, where physical and economic factors render a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one competitor can survive in the market, it makes sense to allow the local government to choose the best applicant.

800 F.2d at 714 (quoting 610 F. Supp. at 899-900).

It is clear, however, that "physical conditions" do not make cable television a "natural monopoly." Unlike broadcasting, where the need for proper spacing to avoid interference along the electromagnetic spectrum in fact imposes physical limitations on the number of broadcast providers, operation of multiple cable television systems is not similarly constrained.[7] This has led every other

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[7] The argument that poles can only accommodate one set of cable wires is no longer plausible given present technology. *See, e.g., Community Communications Co. v. City of Boulder (Boulder I)*, 630 F.2d 704, 712 (10th Cir. 1980) (Markey, J., dissenting) ("[A]s the record makes clear, modern technology makes free and open competition both practically and economically available to the city by at least four competing cable communicators."), *rev'd*, 445 U.S. 40 (1982). Moreover, as the Federal Communications Commission recognized in a recent Notice of Inquiry concerning the provision of cable television services by telephone operating companies, telephone facilities (which at present reach almost every U.S. home) could readily be used for the carriage of cable signals in the absence of public policy decisions to the contrary. *See* FCC Dkt. No. MM 85-349 (Aug. 7, 1986). Finally, of course, there are many alternative technologies providing most of the services offered by cable that do not utilize cable wires. *See* page 18 *infra*.

court that has recently considered the issue to conclude that the physical scarcity rationale used to justify regulation of broadcast entities does not apply to cable.[8]

Thus, the Eighth Circuit is left with the theory that "economic factors render a market incapable of accommodating more than one cable television system." 800 F.2d at 714. Even if factually correct, this "economic scarcity" rationale has explicitly been rejected by this Court as a basis for governmental regulation of the media. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court struck down a state statute granting political candidates a right to equal space to reply to criticisms published in newspapers. Despite acknowledging that most newspapers possessed a monopoly in their areas of distribution (the only fact that appears to support the "natural monopoly" conclusion of the panel in this case), *Tornillo* rejected the argument that the states could impose a limited right of access to the press merely because economic conditions made entry into newspaper markets difficult.

In reaching this decision, this Court found that "[T]he same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers [make] entry into the marketplace of ideas served by the print

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[8] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985) (recognizing that cable technology has evolved significantly and that the physical scarcity rationale no longer applies), *aff'd and remanded*, 106 S. Ct. 2034 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449 (D.C. Cir. 1985) ("[physical] 'scarcity' rationale has no place in evaluating government regulation of cable television"), *cert. denied*, 106 S. Ct. 2889 (1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982) ("Frequency interference [is] a problem that does not arise with cable television."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.) ("An essential precondition of [broadcast] theory—physical interference and scarcity requiring an umpiring role for government—is absent."), *cert. denied*, 434 U.S. 829 (1977).

media almost impossible." *Id.* at 251 (footnote omitted).[9] Yet even though economic conditions were likely to dictate only a single daily newspaper (in many cases commonly-owned with other communications media), this Court held that the restriction on speech resulting from the state right of reply statute—a restriction several orders of magnitude less severe than the absolute exclusion sanctioned by the Eighth Circuit in this case—could not be justified under the First Amendment. *Id.* at 258.

As the D.C. Circuit has already recognized, the principles of *Tornillo* are clearly applicable to cable television services.[10] All forms of media are characterized by certain economies of scale that may result, in some instances, in the emergence of a single seller in a particular locality. Under the analysis utilized by the Eighth Circuit, virtually any community (which experience has shown is likely to support only a single daily newspaper) would be entitled to offer an exclusive franchise for the newspaper publishing business. Yet it is inconceivable that any court would, solely on the basis of economic conditions, permit a municipality to create an exclusive franchise for one newspaper and to exclude all others.

Cable television should be no different. The designation of an exclusive cable franchise and the prohibition

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[9] By 1973 effective newspaper competition existed in only 4 percent of U.S. cities. 418 U.S. at 249, n.13. Recognition of the economic constraints affecting daily newspapers had prompted passage of the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*, which permits, under certain circumstances, combination of the physical production facilities of two newspapers to preserve separate and independent editorial voices.

[10] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.) (scarcity resulting from economic conditions is insufficient to justify even limited government intrusion into First Amendment rights; "there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point"), *cert. denied*, 434 U.S. 829 (1977). Indeed, the Eighth Circuit had previously cited *Home Box Office* with approval on this point. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

of all other cable system operators simply cannot be reconciled with the First Amendment. The Eighth Circuit's failure to recognize this fact has grave implications for the future effectiveness of cable and other new technologies as developing methods of communications.

B. Even If a Market Will Support Only a Single Provider of Cable Television Services, The Selection of That Provider Should Be Made By Consumers In The Marketplace.

The error represented by the designation of an exclusive cable television franchise is compounded by the City's role in selecting the operator of that franchise. Even if the Jefferson City market should prove able to support only a single provider of cable television services, the First Amendment forbids the selection of the exclusive cable speaker by the government. The desire to dictate the sole provider of cable television communications "cannot serve as the articulated, compelling state or governmental interest required to justify an otherwise constitutionally prohibited silencing of the right of free speech and free press." [11] Yet this is just what the Eighth Circuit permits by endorsing the grant of an exclusive cable franchise and municipal selection of its operator.

This procedure is no more consistent with the First Amendment than allowing a municipality to designate a particular newspaper to serve its community simply because the city council concluded that it could support only one newspaper. As the Ninth Circuit has found:

> Allowing a [franchising] procedure such as the City's would be akin to allowing the government discretion to grant a permit for the operation of newspaper vending machines located on public streets only to the newspaper that the government believes "best" serves the community, a practice which we find clearly invalid.

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[11] *Community Communications Co. v. City of Boulder (Boulder I)*, 630 F.2d 704, 713 (10th Cir. 1980) (Markey, J., dissenting), *rev'd*, 455 U.S. 40 (1982).

Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d at 1409.

No sound argument supports the claim that franchising contests conducted by political entities are better able to select cable firms than consumers who vote with their dollars by choosing among competing offerings. While "[c]ompetitive incentives can usually ensure responsive service, efficient production, and cost-based pricing," it is generally conceded that "[r]egulation generally does not have as enviable a record." [12] The limitations of municipal action to award cable franchises are well known, as is evidenced by the delays associated with bringing cable services to many of the nation's largest cities.[13] Moreover, the level of economic waste introduced by the cable franchising process itself and by the over-investment required by the political competition for the franchise is significant.[14]

Against this record, a competitive marketplace solution, even if it results in only one surviving firm, is much more likely to ensure that that firm is best able to

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[12] *See* Owen & Greenhalgh, "Competitive Considerations in Cable Television Francising," 4 *Contemporary Policy Issues* 69, 71 (Apr. 1986).

[13] *See, e.g.*, Hazlett, "Why Cable TV Needs a Free Market," *N.Y. Times*, Nov. 17, 1985 at 2F, col. 3 (Philadelphia has gone through five franchising battles since the 1960's and is still without cable).

[14] One study has concluded that the costs imposed by the franchising process on cable consumers and suppliers equal one-fourth of total revenue or more than twice the level of pre-tax profit. Hazlett, "Competition vs. Franchise Monopoly in Cable Television," 4 *Contemporary Policy Issues* 80, 95 (Apr. 1986). The political nature of these franchising battles is demonstrated here by the fact that Central sought the aid of a number of politically well-connected persons in an attempt to influence the franchise award. For example, one of the principals of Central, Eugene Bushman, had not previously worked in the cable industry but had been a political lobbyist and attempted to use his political connections in the franchising process. *See, e.g.*, PX 334 (letter authored by Bushman invoking name of Senator Eagleton without his knowledge or authorization in attempt to obtain bond broker).

serve the wants and desires of the public. The continuing existence of competition fueled by the presence of actual competitors or the possibility of new entry in the marketplace is more likely to produce superior performance than that of a monopolist awarded an exclusive franchise by the municipality and thereafter immunized from any competition.[15]

In addition to its logical force, this argument is consistent with the command of the First Amendment to avoid governmental actions to control the content of speech by selecting the conduit for it.[16] In the absence of conditions such as the physical scarcity that justifies broadcast regulations, the First Amendment prohibits government action that selects those who will be permitted to speak or the content of that message.[17]

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[15] Indeed, the passage of the Cable Communications Policy Act of 1984, P.L. 98-549, which largely eliminated the authority of municipalities to impose rate regulation on cable systems, places significant limitations on municipal regulation of cable companies. Because of this, "It is reasonable to conclude that overbuild competition has a potentially significant welfare-enhancing role and that municipalities and operators may opt for overbuilding more often than in the past." Smiley, "Direct Competition Among Cable Television Systems," EAG Discussion Paper 86-9, Antitrust Division, U.S. Dep't of Justice at 35 (June 5, 1986).

[16] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053 (8th Cir. 1978).

[17] The Eighth Circuit recognized this pitfall but attempted to side-step it by disclaiming "We note that there is no question here of content regulation in determining who would be the 'best' applicant." 800 F.2d at 714, n.4. This effort is futile, however, for the court clearly relied on the alleged superiority of Central's franchise proposal as a basis for rejecting TCI's First Amendment claims. *See, e.g.*, 800 F.2d at 717 ("Central's proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming available."). Such content-based determinations are an inevitable consequence of governmental determination of the only cable speaker. Furthermore, as noted above, the history of the cable industry has shown that municipal franchising procedures often invite "overbidding" by weighting the decisional process in favor of expensive, frequently impractical, cable systems. In city after city, once these promises of technologi-

II. The Eighth Circuit Failed to Conduct an Independent Examination of The Entire Record Prior to Approving a Limitation of TCI's First Amendment Rights.

The abridgement of First Amendment rights sanctioned by the Eighth Circuit becomes even more egregious given the lack of factual support in the record for its rejection of TCI's First Amendment claims. Where First Amendment rights are involved, this Court has required that an appellate court conduct an "independent examination of the whole record" before approving a limitation of free expression. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984). Since this examination was lacking here, the Eighth Circuit's decision must be reversed.

A. The Record Below Establishes That TCI Did Not Seek an Exclusive Franchise.

The Eighth Circuit's first basis for rejecting TCI's First Amendment claim—the company's alleged "insincerity" in advocating competition—reflects the court's view that "TCI's first amendment defense fails on its facts because it did not seek to simply remain in the market but to continue its monopoly." 800 F.2d at 713. The court cites no specific factual evidence in support of this conclusion, apart from the assertion that TCI "began a campaign, accompanied by various unethical and illegal acts, to coerce the city to grant it an exclusive franchise." *Id.* at 712-13.

There is abundant evidence in the record, however, that TCI never sought an exclusive franchise and that, while not welcoming the prospect of additional competition (as few businessmen would), it was fully prepared to deal

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cally advanced systems prove impossible to implement, they are eliminated through renegotiation. *See, e.g.*, Paul Kagan Associates, Inc., *Cable TV Francising* (Nov. 20, 1985) at 4-5 (70% of the initial franchises awarded in major markets since 1975 have already been renegotiated). Thus, the alleged superiority of a proposed system may never be fully realized and a court's reliance on such superiority in making First Amendment decisions would be unfounded.

with such competition in the marketplace.[18] None of this evidence is even discussed by the court.[19]

B. The Record Below Does Not Support The Finding of a "Natural Monopoly."

The court's reliance on a finding that cable television in Jefferson City was a natural monopoly is equally flawed. The opinion devotes less than one page to this critical issue, stating only that the "natural monopoly" was proven "to the satisfaction of the jury and the trial judge," and that there is "substantial support in the record" for that conclusion. 800 F.2d at 717. The only record evidence cited by the court to support its "natural monopoly" finding—a consultant's study prepared on be-

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[18] As TCI's President John Malone testified, "[W]hile we didn't encourage competition, we accepted it as a fact of life." Malone, 30 Tr. 88. In an advertisement directed to the customers of TCI Cablevision, TCI opposed Central's request for an exclusive franchise and stated:

> TCI believes that the citizens of Jefferson City (and eventually Cole County) should be the ultimate judges of the competing service offered by the two companies . . . TCI has no objection if the City enters into contracts with competitors of TCI, but feels that it, too, has a right to do business in Jefferson City.

DX 61. In various discussions with the City Council, TCI's representatives also repeatedly recognized that TCI's contract was not exclusive and that they were fully prepared to meet competition from another cable company. DX 75; PX 53; PX 144, p. 12.

[19] Other findings relating to TCI's conduct and motivations appear similarly unsupported. One incident, emphasized by the district court, was the alleged attempt by TCI "to intimidate city officials by threatening to flood the . . . City market with satellite dishes if defendants' franchise was not renewed." 610 F. Supp. at 895. Yet this "threat" appears nowhere in the record. At one Council meeting, a TCI representative stated that TCI was familiar with the problem of illegal interception of satellite-delivered programming because it was "the largest distributor in the nation of backyard dishes," with "an exclusive in seventeen states including Missouri." PX 144, p. 23. It is hard to see the "threat" in such a statement and Central's attorney described the issue as "[n]ot particularly relevant in this case." 32 Tr. 35.

half of Central for this litigation [20]—is hardly an overwhelming basis to support this critical economic determination.

Other record evidence is contrary to this conclusion. A starting point for any analysis of the natural monopoly issue should be the competitive conditions that shape the market for cable television, yet the Eighth Circuit pays no attention to the unique characteristics of Jefferson City. For example, the City's geography makes reception of over-the-air broadcast signals very difficult. 610 F. Supp. at 894, n.3. As a result, cable penetration rates would be expected to be very high,[21] a fact that would make competitive cable operations more likely than in other communities.[22] This was particularly so given the fact that overbuilds appear to stimulate more community interest in cable, thereby leading to more total subscribers. Malone, 30 Tr. 53.

From a technical standpoint, there was nothing that would prohibit more than one cable company from operating a cable system in Jefferson City.[23] Yet no one at

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[20] *See* 800 F.2d at 717 n.6.

[21] Trial testimony established that, as a general rule, between 30 and 40 subscribers per mile are necessary to operate a profitable system. *E.g.*, Sparkman, 26 Tr. 160-61. In 1981, TCI had achieved a penetration rate for the City of 65.5 subscribers per mile and in 1982, 68 subscribers per mile. PX 171(c).

[22] Jefferson City was described by one of Central's proposed bankers as "virtually an ideal franchise. It's a long distance from broadcast programming. It's a hilly country, has a pretty good density for a city of this population . . . offering the potential for 60%-70% subscription rate." Haynes, 19 Tr. 61. One of Central's economic witnesses similarly testified that the high subscriber rate in the City demonstrated "that cable tv was a very saleable product in Jefferson City." Perry, 28 Tr. 83.

[23] TCI leased the use of a strand for coaxial cable support from the telephone company, United Telephone (PX 2) and TCI had no control over who could use the strand. Lee, 27 Tr. 53-53. There apparently were no technical or legal reasons why two or more cables could not be lashed to a single strand, a process called "bundling"

Central had ever made an effort to find out what it would cost to place a second set of cables on the existing poles. Schott, 6 Tr. 8.[24]

Moreover, based on Central's own damage theory, the likely profitability of the Jefferson City franchise belies the existence of a natural monopoly. The exceedingly high rate of return on investment represented by the jury's award of $10.8 million in compensatory damages reflects a level of anticipated profits from the operation of the cable system that would be certain to attract competitive entry into the market.

The Eighth Circuit also failed to even acknowledge the existence of (much less give any consideration to) the general body of economic learning relevant to the "natural monopoly" issue, particularly recent economic studies raising serious questions about the application of the natural monopoly theory to the cable television industry. It is undisputed that operation of a cable television system requires a significant capital investment in both facilities and equipment, and that economies of scale arise as these fixed costs are spread over larger and larger numbers of subscribers.[25] Nevertheless, the historical wisdom that

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of cables. Schott, 5 Tr. 45-46; Lee, 27 Tr. 51-52. One of the principals of Central admitted that a cable company he had previously owned had shared a strand on the same poles with another cable company (Schott, 6 Tr. 21).

[24] One factor that would affect the viability of Central's proposal in an overbuild contest was its higher cost. The total cost of the system Central proposed to build was higher than would otherwise be necessary, since it originally included an institutional loop, a large amount of free services for the city, expensive local studies, and addressable converters. Graham, 4 Tr. 45-46. This, of course, would require a larger number of subscribers than a lower cost system to reach the break even point.

[25] Cable television is not unique in this regard, for economies of scale arise as all media products are shared with increasing numbers of viewers or readers. For example, the cost of producing (and, in the case of broadcast television, distributing), a book, television show or newspaper article remains unchanged whether

such investment and scale economies represent an insuperable barrier to competitive cable operations is increasingly being challenged, and recent economic studies have failed to support this theory.[26]

The experience of those areas where cable systems currently do compete shows that such competition is not only possible, but appears to produce the consumer benefits, including lower prices, that one expects from competition.[27] This is not consistent with the existence of a "natural monopoly."

Moreover, recent evidence of successful competition in other markets long thought to be "natural monopolies" should make one skeptical of similar claims in cable markets. Long distance telephone service was supposed to represent a "natural monopoly," but now—after regulatory intervention to end the monopoly—it turns out that the monopoly was not "natural" after all. Overnight mail delivery service is another example of an industry where

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they are read or viewed by one person or one million. *See, e.g.*, B. Owen, *Economics and Freedom of Expression* 19 (1975).

[26] *See, e.g.*, Owen & Greenhalgh, *supra* note 12, at 78. While these authors of a recent study of overbuild costs found a 14 percent penalty in unit costs per subscriber resulting from head-to-head competition between two cable systems operating down the same streets (the worst case scenario in terms of overbuilt systems), they concluded that:

> Although this is hardly negligible, it is within the range of monopoly markups that might be expected in the absence of competition or effective regulation. Therefore, consumers might be better off with competition, in spite of the cost penalty from lost scale economies.

Id. at 76.

[27] Hazlett, *supra* note 14, at 91 (duplicative systems' rates for basic cable service and HBO were estimated to be $1.82/month lower than those of monopoly jurisdictions, providing "direct evidence that monopoly franchising tends to raise prices to consumers").

competition should not be possible under the "natural monopoly" theory.[28]

Indeed, cable seems much less likely than either of these examples to constitute a "natural monopoly" since cable television must compete in a broad entertainment and information market with many similar services (including, at a minimum, over-the-air broadcast services, videocassettes, newspapers, magazines, movies, theaters, and books). Whether viewed as part of a broad entertainment and information market, or merely as part of a narrower video programming market, cable operators hardly have the luxury of a monopoly hold over consumers. Thus, the "natural monopoly" conclusion on which the Eighth Circuit's opinion rests is not only not supported by the record, it is very likely to be just plain wrong.

In sum, the Eighth Circuit simply assumed the conclusion that "there was economic capacity for only one speaker." 800 F.2d at 717. It conducted no independent analysis of that issue and the analysis of the district court was demonstratively inadequate. Given the importance of the First Amendment interests at stake and the impact of that conclusion on those interests, the court's review of this issue was not consistent with controlling decisions of this Court.

In cases involving the First Amendment, this Court has repeatedly held that "an appellate court has an obligation to 'make an independent examination of the

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[28] The U.S. Postal Service already possessed an existing infrastructure through its government monopoly over first class mail delivery, any newcomer would have to duplicate an extensive system of local offices, delivery routes, sorting facilities, etc., and the economies of scale clearly involved would likely permit a single firm to serve the entire market at a lower per unit cost than two or more firms. Yet the successful entry of and competition introduced by firms such as Federal Express, Emery, Purolator Courier, DHL, Airborne and others completely destroys the "natural monopoly" hypothesis in this industry.

whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86 (1964)).[29] Here, the Eighth Circuit's failure to conduct this independent examination is particularly troublesome given the absolute ban on the exercise of First Amendment rights represented by an exclusive franchise. As the district court in this case recognized, "[I]f the market has room for more than one cable system, a city's efforts to artificially limit the number of operators would constitute a prior restraint in violation of the First Amendment." 610 F. Supp. at 901. Such is clearly the case here.

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[29] This requirement reflects "a deeply held conviction that judges —and particularly members of this Court—must exercise such review in order to preserve liberties established and ordained by the Constitution." 466 U.S. at 510-511. As a result, it is a

> [S]ettled principle that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded."

Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

CONCLUSION

For the reasons stated above, the decision of the Eighth Circuit in this case erroneously limits an important constitutional right. In order to prevent this error from further infecting the First Amendment rights of cable system operators, the Institute respectfully requests that the petition for a writ of certiorari be granted so that the judgment below can be reversed.

Respectfully submitted,

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No. 86-1159

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TCI CABLEVISION, INC.,
COMMUNITY TELE-COMMUNICATIONS, INC.,
and TELE-COMMUNICATIONS, INC.,
Petitioners,

v.

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the First Amendment entitle an entrenched cable operator to employ personal threats, "commercial blackmail," "pure fraud," and other "unethical and illegal acts"—in the words of the courts below—solely to block competition from other cable operators and continue its monopoly, as the jury found?

2. Were petitioners improperly denied independent appellate review of the record, when the Court of Appeals "thoroughly examined the record" and concluded—citing and quoting from particular portions of the record—that "[t]here is substantial support in the record" for the jury's findings?

3. Was petitioners' conduct legitimate lobbying constitutionally protected by the *Noerr-Pennington* doctrine, when that conduct included personal warnings that were understood to be murder threats, commercial blackmail, fraud, intimidation of the elderly residents of a senior citizens' home, threats to "make trouble" for a competitor in another market, and the like?

PARTIES TO THE PROCEEDINGS

Petitioners TCI Cablevision, Inc., Community Tele-Communications, Inc., and Tele-Communications, Inc., were defendants-appellants below. Respondent Central Telecommunications, Inc., was plaintiff-appellee below. Pursuant to Rule 28.1, respondent notes that it has no parents, subsidiaries, or affiliates.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Central Telecommunications, Inc. ("Central") respectfully prays that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

Petitioners (collectively "TCI") were awarded a three-year cable television franchise for the Jefferson City market in 1978. Shortly before the franchise was due to expire, the City initiated a bidding process to solicit bids to determine the next franchisee. Respondent Central and one other company—Teltran—submitted bids. TCI

refused to do so, and instead undertook a campaign "accompanied by numerous unethical and illegal acts" to block the award of a franchise to anyone other than itself. App. at 2a.

The tactics employed by TCI included personal threats directed against a consultant hired by the City to evaluate bids. TCI's vice president and national director of franchising threatened the consultant as follows:

> We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around[.] We are going to see that you are ruined professionally. [App. at 13a.]

As the Court of Appeals noted, the consultant "understood these statements to be a threat to the lives of himself and his family." *Id.* TCI also contacted another large cable company that was a client of the consultant, and thereafter the consultant lost the company as a client. *Id.*

In an effort to pressure the City to award it the franchise, TCI refused to pay past-due franchise fees of over $60,000 to the City, a tactic the District Court characterized as "nothing short of commercial blackmail." *Id.* at 45a. TCI publicly announced that it would cut off service if it were not awarded the franchise, and threatened that it would not sell "one bolt" of its system to a new franchisee "at any cost." *Id.* at 14a. TCI threatened to flood the Jefferson City market with satellite dishes if it were not given the cable franchise, a threat the District Court found to be "pure fraud." *Id.* at 45a. TCI's system manager told the elderly residents of a senior citizens' home that they would be without television for two years if TCI were not granted the franchise, "because the concrete walls of their residence would not allow reception of over-the-air stations." *Id.*

at 14a. TCI's vice president also met with the chief operating officer of Teltran, "and threatened him that unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise." *Id.* at 12a. Teltran withdrew. *Id.*

After the foregoing, TCI and certain City officials—including the mayor—met secretly to negotiate a franchise for TCI, in violation of state law and the rules for the bidding process. *Id.* at 13a & n.8, 14a. When the City Council nonetheless voted 6-4 to award a franchise to Central, the mayor—who had previously recused himself from the process due to an alleged conflict of interest—vetoed the award. *Id.* at 14a. The Council then deadlocked 5-5 on an award to TCI. The mayor broke the tie in favor of TCI, which was awarded a seven-year de facto exclusive franchise. *Id.* at 14a-15a.

Central filed suit to recover for the damage caused by TCI's successful efforts to block it from competing in Jefferson City. Central sued on the basis of (1) conspiracy to unreasonably restrain trade, (2) actual monopolization, and (3) tortious interference with a business expectancy, in violation of state law. After 31 days of trial, a jury the District Court regarded as "extremely attentive" returned a verdict in favor of Central under *each* of the three theories. *Id.* at 39a.[1]

The District Court denied TCI's motions to set aside the jury verdict. App. at 38a. The District Court rejected TCI's argument that the First Amendment precluded recovery by Central for the harm caused by TCI's conduct, noting that the argument "misperceives the theory of the case that was submitted to the jury" and "is nothing more than a red herring." App. at 47a, 55a. With respect to TCI's claim that its conduct was con-

[1] Execution by Central would be on the state law judgment for tortious interference.

stitutionally protected by the *Noerr-Pennington* doctrine, the District Court reviewed the specifics of that conduct and concluded that "[t]he record clearly contained sufficient evidence to support the jury's finding" that the conduct of defendants was not protected. App. at 44a.[2]

The Court of Appeals affirmed. In his opinion for the unanimous court, Judge Heaney noted that there was "a significant factual problem" with TCI's First Amendment argument, concluding that the argument "fails on its facts" in light of the "substantial evidence in the over 7,000-page record in support of [the] conclusion by trial judge and jury" that TCI did not seek simply to remain in the market but to continue its monopoly. App. at 4a. The court also rejected TCI's *Noerr-Pennington* defense, noting that the jury could have based liability entirely on conduct TCI *conceded* was not protected. App. at 15a-16a. The court also upheld the instructions to the jury on the defense, finding them "proper under the case law, the facts of this case, and in light of the instructions submitted by the parties." App. at 19a.[3] The court found it unnecessary to reach several other reasons raised by Central why TCI's conduct was not protected, though it did note that "some of these arguments may have merit." App. at 25a n.15.[4]

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[2] In contrast, the District Court found that Central "at all times remained within legitimate lobbying channels in seeking a cable television franchise." *Id.* at 61a.

[3] The Court of Appeals concluded that "the jury could properly have found, based on the facts and the court's instructions, that TCI's activities, more than being simply anti-competitive, were not genuine lobbying activities at all but instead were heavy-handed attempts to directly interfere with the business relationships of a competitor, to disturb the political process and to coerce the City into extending TCI's monopoly position, even though Central offered a superior cable system at lower cost." App. at 20a n.11.

[4] Central argued that the *Noerr-Pennington* doctrine did not even apply since the City was acting in a commercial rather than governmental capacity; that the City's role was not protected

TCI filed the instant petition after the Eighth Circuit denied rehearing and unanimously rejected TCI's suggestion for rehearing *en banc*. App. at 83a.

REASONS THE PETITION SHOULD BE DENIED

TCI's petition presents four questions for review, some of which may well merit consideration by this Court in an appropriate case. Whatever significance these questions may have in the abstract, however, none of them is presented on the facts of this particular case. As the Court has noted on several occasions, it sits to decide cases, not abstract or hypothetical questions.[5] The facts of this case—found by a jury and affirmed on review by the District Court and the Court of Appeals—preclude reaching the broad questions presented in TCI's petition. The petition should therefore be denied.

I. No First Amendment Issue Is Presented on the Facts of This Case

TCI's petition seeks to present a question concerning municipal regulation of cable television. *See* Pet. at i. That question is not presented in this case.

"state action" clearly sanctioned under Missouri law; and that the doctrine was inapplicable in light of the jury finding of an illegal conspiracy between TCI and certain City officials. App. at 25a n.15.

[5] For example, in *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), the Court was compelled to dismiss a writ of certiorari as improvidently granted, when the broad question presented in the petition turned out not to be presented on the record.

As Justice Brennan noted for the Court:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of [the conflict] can await a day when the issue is posed less abstractly. [*Id.* at 184.]

The jury found that TCI, through a campaign "accompanied by numerous unethical and illegal acts," blocked Central from competing for a cable television franchise in Jefferson City. App. at 2a. Despite the fact that TCI held and holds the de facto exclusive franchise in Jefferson City, TCI nonetheless argued below that Central was not injured by TCI's efforts, because the First Amendment precludes such franchises.[6] TCI contends that it had no objection to other competitors entering the market, and simply sought to exercise its own First Amendment right to remain in the market. Pet. at 5. As the court below stated, however, "[b]efore reaching the merits of this argument, we note that there is a significant factual problem with it." App. at 4a.

The "significant factual problem" is that the jury found on the basis of " 'substantial evidence' " that TCI's activities were not merely efforts to remain in the market and exercise its First Amendment rights, but rather were " 'a calculated scheme to prevent [Central] from entering the Jefferson City market and to maintain a *de facto* exclusive franchise for themselves.' " App. at 4a (quoting District Court, App. at 53a). TCI attempted to defend its "unethical and illegal acts" by claiming that it sought to remain in the market, and that it had a First Amendment right to do so. As the court below held, however, "TCI's first amendment defense *fails on its facts* because it did not seek to simply remain in the market but to continue its monopoly." App. at 4a (emphasis supplied).[7]

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[6] Throughout the petition, TCI refers to its franchise as "nonexclusive" and the franchise sought by Central as "exclusive." *See, e.g.*, Pet. at 2. The franchises, however, were the same and were described by the court below as "de facto exclusive." App. at 2a n.1.

[7] TCI acknowledges this as "an alternative holding" of the court below. Pet. at 9 n.9. TCI does not attempt to explain how this Court could reach the question it seeks to present, in light of the conceded alternative holding.

To reach the question TCI raises in its petition, it would first be necessary for this Court to review and overturn the jury's factual finding, affirmed on review by both the District Court and the Court of Appeals. For regardless of whether the First Amendment permits a municipality to award a de facto exclusive franchise, it clearly does not sanction "unethical and illegal acts" by one competitor designed to destroy another. App. at 2a. *See Associated Press* v. *United States*, 326 U.S. 1, 19-20 (1945).

In short, the entire First Amendment issue TCI seeks to raise hinges on TCI's assertion that it sought not to block competition but to remain in the market itself. The jury found as a fact—supported by "substantial evidence in the over 7,000-page record"—that this was simply not the case. App. at 4a. As the District Court concluded:

> [TCI] had every opportunity to produce evidence and make arguments to convince the jury that [Central's] exclusion from the Jefferson City market was the result of either the city's efforts to artificially limit the number of franchisees or [Central's] unwillingness to compete head-to-head with [TCI] in the market. [TCI] also enjoyed every opportunity to produce evidence and make arguments to persuade the jury that they were at all times in favor of head-to-head competition in the marketplace. If the jury had been swayed by any of these arguments, it would not have found against [TCI]. [App. at 55a.]

Nor was it even necessary for the jury to find that the cable market in Jefferson City was a "natural monopoly," as TCI assumes it did in framing the First Amendment issue. *See* Pet. at i, 9, 14-20. The case was presented to the jury on alternative theories. If the jury found that the market *was* a natural monopoly, it was to consider whether TCI engaged in anti-competitive or predatory conduct with respect to competition *for* the

market. If, on the other hand, the jury found that the market was *not* a natural monopoly, it was instructed to consider whether TCI engaged in such conduct with respect to competition *in* the market. As the District Court noted:

> [I]t was never necessary for the jury to frontally consider [TCI's] "First Amendment defense." If the jury had found that the city was solely responsible for artificially limiting the number of franchisees in the Jefferson City market, then *a fortiori* it would have found neither that [TCI] possessed monopoly power nor that [TCI] caused the city to veto [Central's] franchise. Conversely, since the jury found that [TCI] possessed monopoly power and that [TCI] caused the city to veto [Central's] franchise, the Court is compelled to conclude that [TCI's] "First Amendment defense" is nothing more than a red herring. [App. at 54a-55a.]

The court below reached the merits of TCI's First Amendment defense only by "[a]ssuming arguendo" that TCI was willing to engage in legitimate competition, contrary to the jury verdict. App. at 4a. Even the court's discussion of the merits, however, was carefully circumscribed:

> [W]e make clear, as did the Supreme Court in *Preferred Communications*, that we are unwilling to decide any question which is not squarely before us and on which there has not been a full development of the record. We are not faced here with a challenge to the details of Jefferson City's franchise regulations * * *. [App. at 9a-10a.]

Every one of the cases cited by TCI as presenting the issue it seeks to raise in this case involved litigation between a cable operator and a municipality or other governmental authority. *See* Pet. at 13 n.18. This case does

not.[8] It involves litigation between competing cable operators, and any question of the scope of the municipality's powers was considered "only in terms of the competing technologies offered by TCI and Central." App. at 10a. This Court should not attempt to answer any questions concerning municipal regulation of cable television in a dispute between private litigants where no party—municipality or otherwise—participated in support of the regulation. As the District Court noted, "the true issue in this case was whether defendants were responsible for plaintiff's exclusion from the Jefferson City market. The jury's conclusion that defendants were responsible parties completely undermines any attempt to pass the blame on to the city by way of an amorphous 'First Amendment defense' in this case." App. at 55a.

Even if this Court were inclined to consider the issue of a municipality's powers with respect to cable franchising, it should do so in a case in which that question is directly presented, and not in a case in which "there has not been a full development of the record" on that issue. App. at 10a. As the cases cited by TCI indicate, *see* Pet. at 13 n.18, there will be no shortage of suitable cases.

The result in this case does not depend on whether the cable market in Jefferson City is a natural monopoly, nor on whether the City may award an exclusive franchise. Given the alternate theories of the case on which the jury was instructed, it could have found TCI liable based on a finding that the market was *not* a natural monopoly. The jury found that it was TCI—not the City—that injured Central. The broad question of the

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[8] Although the City was originally a party to this action, TCI filed no cross-claim against the City, and the City was subsequently dismissed from the case and did not participate in any way in the trial or the subsequent appeal. Nor is it a party before this Court.

City's powers with respect to cable franchising is simply not presented in this case.

II. The Court of Appeals Independently Reviewed the Record

TCI maintains that the court below erred because it did not independently review the jury's "implied finding" that the Jefferson City market was a natural monopoly. Pet. at 21. In fact, the Court of Appeals did precisely what TCI contends it should have done. The court below did not simply defer to the "implied finding," nor did it uphold it on the basis of a deferential "clearly erroneous" standard of review. On the contrary, the court independently reviewed the record and concluded that "[t]here is substantial support *in the record* for these factual findings." App. at 10a (emphasis supplied). The court specifically referenced a study and quoted from testimony in the record that it considered particularly supportive of the implied finding. *Id.* at 10a n.6.[9]

Contrary to TCI's assertion, the court below thus fully complied with the requirements of *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), assuming that the standard in that case even applies.[10] TCI cites the evidence it submitted to the jury, Pet. at 21, but the short answer is that the jury chose not to believe that evidence but instead to believe the evidence submitted by Central. As the court below held after its independent review of the record, there was "substantial support" for the jury's conclusion. App. at 10a. Since the court below applied the *Bose* standard of

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[9] As Judge Heaney stated at oral argument, the Court of Appeals went so far as to listen to the tapes of the closing arguments of counsel at trial.

[10] Since this was an antitrust and tortious interference case rather than a First Amendment case, of course, the court below was not required to follow the *Bose* standard of review. The factual findings below make it unnecessary even to reach the specific factual issue that TCI contends must be independently reviewed.

review, this Court should not review the entirely fact-bound question of whether the evidence supports TCI or Central. In any event, the "implied finding" of natural monopoly was not even necessary to support the jury's verdict, in view of the alternate theories of the case. *See* App. at 50a-55a. Even if TCI were correct on this point, the result would be unchanged.

III. The Court of Appeals Correctly Applied the *Noerr-Pennington* Doctrine, and TCI's Conduct Would Not Be Protected Under Any Conceivable Interpretation of *Noerr-Pennington*

TCI contends that the Court of Appeals adopted an unduly restrictive view of the *Noerr-Pennington* doctrine, permitting the jury to find it liable on the basis of conduct that should have been protected as legitimate lobbying. Pet. at 22-29. The court below, however, correctly applied the *Noerr-Pennington* doctrine, and TCI's conduct in this case far exceeded the scope of any conceivable conduct protected by *Noerr-Pennington.* In any event, the jury could have found— and probably did find —TCI liable on the basis of conduct TCI itself concedes is unprotected by *Noerr-Pennington.*

TCI employs a variety of euphemisms to describe its conduct in blocking Central's effort to compete: "robust" persuasion, "political activity," "aggressive lobbying," "unpopular lobbying." Pet. at 4, 22, 23. The courts below, however, took a decidedly different view, describing TCI's conduct as "unethical and illegal acts," "coercive threats," "excessive and intimidating conduct," "commercial blackmail," "pure fraud," "complete fraud," "misstatements," and "illegal private negotiations." App. at 2a, 15a, 25a, 45a, 40a, 14a, 23a n.13. According to TCI, "TCI, *and* Central, *and* the City all apparently engaged in activity about which none of them can be very proud, judging from the accusations and counter-accusations which were made by the parties." Pet. at 24

(emphasis in original). Judging from the jury's findings, however, it was solely TCI representatives who did the following:

- Threatened a consultant retained by the City to evaluate bids by stating: "We know where you live, where your office is and who you owe money to. We are having your house watched and we are going to use this information to destroy you. You made a big mistake messing with T.C.I. We are the largest cable company around[.] We are going to see that you are ruined professionally." App. at 13a.
- Publicly attacked the qualifications of the consultant in a defamatory manner. *Id.* at 12a.
- Threatened the chief operating officer of a rival bidder, Teltran, that "unless Teltran withdrew from the bidding process, TCI would make trouble for Teltran in Columbia, Missouri, where it operated a cable television franchise." (Teltran withdrew.) *Id.*
- "[T]old elderly residents of a senior citizens' home that TCI would cut off service if denied a franchise, and the residents would be without television for two years pending construction of a new system because the concrete walls of their residence would not allow reception of over-the-air stations." *Id.* at 14a.
- Withheld $60,000 in past-due franchise fees due the City to pressure the City to award it a franchise. TCI paid the past-due fees the day after it was awarded its new franchise. App. at 14a-15a.
- Misrepresented to the City Council that TCI was the largest distributor of satellite dishes in the country, and the exclusive distributor in Missouri, implying that "TCI would flood the City with satellite dishes unless it received the franchise." *Id.* at 14a. As the District Court noted, the threat

was "a complete fraud," since TCI "had never participated in the satellite dish business." *Id.* at 40a.

This is not "aggressive lobbying"; it is not "robust" persuasion. Whatever "problems" the lower courts may be experiencing in applying the *Noerr-Pennington* doctrine, Pet. at 23, it is inconceivable that any court would consider the foregoing—including conduct perceived to be a threat on human life—constitutionally protected conduct.[11] No federal judge in this case has been willing to embrace TCI's argument that its conduct was protected, when death threats and similar conduct—all designed to destroy competition and a competitor—were the hallmark of TCI's actions.[12] The Court of Appeals concluded that "our review of the record reveals full support for the jury's and trial judge's conclusion that TCI overstepped the boundaries of *Noerr-Pennington* protection." App. at 24a. This Court should not undertake a third review of that question.

In any event, TCI concedes that certain of the threats made by its representatives are *not* protected under the *Noerr-Pennington* doctrine. Pet. at 10 n.10, 29 n.41; App. at 15a. As the Court of Appeals held, the jury could have found TCI liable solely on the basis of those concededly unprotected threats. App. at 15a-16a. TCI contends that there is no way of knowing if the jury based its verdict on the unprotected activity or on activ-

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[11] Contrary to TCI's assertions, the decision below in no way conflicts with *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), or *Rural Electric Co.* v. *Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847, 850 (10th Cir. 1985). The most egregious conduct in *Metro Cable* was the use of campaign contributions to influence a legislative body; *Rural Electric* involved only unobjectionable lobbying. Neither case remotely involved threats, defamation, blackmail, fraud, or intimidation of the sort described by the courts below.

[12] As the Court of Appeals stated, the argument that TCI's conduct was protected "proved too much for the trial judge and jury, and it proves too much for us." App. at 25a.

ity TCI claims is protected, but, as the court below noted, "the parties agreed to submit the case to the jury on a general verdict instruction and form, and there is evidence in the record as a whole to support the verdict." App. at 16a.[13]

IV. The Jury's Verdict Was Fully Supported By Circumstantial and Direct Evidence

TCI's fourth question—contingent on a grant of its third—need not detain this Court any longer than it apparently detained petitioners. TCI briefly contends that the jury should not have been permitted to find TCI liable on the basis of concededly unprotected conduct—the threats directed at the consultant and Teltran—because there was no *direct* evidence that the conduct harmed Central. Pet. at 29-30. TCI relies exclusively on two decisions from the previous century, *Manning* v. *Insurance Co.*, 100 U.S. 693 (1879), and *United States* v. *Ross*, 92 U.S. 281 (1875).

This question plainly does not merit the attention of the Court. The jury verdict can be sustained without reference to the particular threats directed at the consultant and Teltran, as the jury could have found TCI liable on the basis of other unprotected conduct. *See* App. at 24a. In addition, *Manning* and *Ross* considered the use of *legal presumptions* in finding facts; no such presumptions were employed in this case. Finally, TCI does not even attempt to demonstrate why this fact-bound question—which, even assuming the validity of

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[13] The Court of Appeals also noted that TCI failed to request that the jury be instructed that certain conduct it now claims is protected could not—standing alone—form the basis of liability. As the court stated: "Had TCI made a simple clear request that the jury be so instructed, it would have been error to refuse the request. But it appears from the record as a whole that TCI was not satisfied with this approach. It rather wanted and requested a broader instruction that would have immunized other conduct which the jury could well have found unlawful." App. at 16a-17a.

TCI's argument, has apparently not troubled the Court for over a century—now warrants review.

CONCLUSION

For the foregoing reasons, and those in the opinion below, the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

TCI CABLEVISION, INC., COMMUNITY TELE-COMMUNICATIONS, INC., and TELE-COMMUNICATIONS, INC.,

Petitioners,

—against—

CENTRAL TELECOMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 18, 1987

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PRELIMINARY STATEMENT

Petitioners respectfully submit this brief in reply to the opposition brief filed by Respondent Central.

Central's opposition to the Petition does not address the serious issues raised by this case. Strikingly, Central seeks to avoid entirely the First Amendment issues on exclusive cable licensing and natural monopoly. As set forth below, those First

Amendment issues are unavoidable. Moreover, Central concedes that the questions presented by the Petition may well merit consideration by this Court. Central, however, argues that this is not an "appropriate" case in which to hear those issues, based on its implicit view that whatever the merits of TCI's legal position, however mistaken the Eighth Circuit may have been, TCI's "bad acts" are so reprehensible that this Court should reject the Petition out of hand. Thus, Central devotes the bulk of its opposition to highly colored reiterations of those "bad acts".

It nonetheless remains clear that the Petition does present pressing consitutional issues of great importance—issues that need prompt resolution by this Court. If the Eighth Circuit's decision is allowed to stand, the impact of its narrow view of First Amendment rights will clearly fall on TCI—and, contrary to Central's implication, will equally continue to haunt the burgeoning cable television industry. (*See* Petition at 13 n.18, 15-20)

ARGUMENT

I. THIS CASE PLAINLY PRESENTS A FIRST AMENDMENT ISSUE.

TCI, as a cable publisher, is entitled to the protection of the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2037 (1986). In this case, however, the Eighth Circuit, applying a lower standard of First Amendment scrutiny to Jefferson City's regulation of cable speech, upheld the City's exclusive licensing scheme based upon the existence of a perceived "natural monopoly". (App. 10a-11a) The court of appeals' ruling put it in conflict with the Ninth and District of Columbia Circuits (and the Federal Communications Commission itself). The court also improperly limited the applicability of this Court's decision in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), to its specific facts. (Petition at 10-20)

Central never addresses those issues, but rather urges that the question of municipal regulation of cable television, and the

inherent First Amendment concerns, are "not presented in this case" because the Eighth Circuit has already held that TCI's "bad acts" deprived TCI of its First Amendment defense. (Brief for Respondent in Opposition ("Opp.") at 5-8)

The courts below and Central failed to appreciate that TCI's First Amendment "defense" is really a failure on Central's part, as a matter of law, to prove an essential element of its claim—that it was injured in a property interest cognizable by the antitrust and tortious interference laws. Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that: "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ." Section 4, therefore, grants recovery only to the extent of injury to "business or property". As the Court has noted, "injury" in this context "implies violation of a *legal* right". *Keogh v. Chicago & N. Ry.*, 260 U.S. 156, 163 (1922) (emphasis supplied). "[W]hether [plaintiff] has property within the meaning of the statute would appear to depend on whether what he possessed was deserving of legal protection." *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 634 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966). Thus, an inherently illegal business or property interest cannot be the subject of a Section 4 claim.[1] Whatever TCI's motives or conduct were, if Central's "property interest" is—as TCI contends—repugnant to the First Amendment, then the analysis *is at an end.*[2]

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[1] Because the invalidity of Central's business expectancy is constitutionally based, Central's recovery under Missouri tortious interference law is barred as well.

[2] This case is therefore not governed by *Associated Press v. United States*, 326 U.S. 1 (1945). There, no one questioned that the business or property interest claimed was a legal and proper one. *Associated Press* may mean that TCI's antitrust *conduct* is not necessarily protected by the First Amendment, but it does not mean that Central may seek recovery for a void property interest. Indeed, the suggestion of the Eighth Circuit that the courts will enforce an unconstitutional interest on account of the "bad acts" of another is so novel—and dangerous—as to suggest in itself the appropriateness of review by this Court.

The property interest alleged by Central in this case (and on which it recovered damages) was an exclusive cable television license—a property right that cannot exist consistent with the First Amendment protections on cable speech. In other words, unless the City Council *could* constitutionally grant an exclusive license to Central (the only property right it claims was injured), TCI's alleged anticompetitive conduct could not support a verdict in Central's favor. Thus, the First Amendment issue is unavoidable. For example, even if this had been a case alleging a conspiracy between the telephone company and the Mayor of Jefferson City to deny Central exclusive access to the utility poles, the First Amendment would still render Central's property interest unconstitutional—even without a cable speaker such as TCI as a defendant. It is the nature of the franchise at issue, as much as any status of TCI as a First Amendment speaker, that raises the constitutional issue. Obviously, if the franchise in question were one to collect refuse, instead of to engage in protected speech, there would be no similar obstacle to an exclusive franchise.

Similarly, contrary to Central's assertion, TCI's First Amendment argument does not hinge on TCI's claim that it did not seek to block competition. (Opp. at 7) Central recognizes that if the jury found that the Jefferson City cable television market was a natural monopoly, the First Amendment issue is presented. Central contends, however, that the jury, under the instructions given to them, could have found that the market was not a natural monopoly and that TCI did not prevent competition *for* the market, but rather restrained competition *in* the market. (Opp. at 7-8; App. 50a-55a) First, this case did not go to the jury on a theory that TCI thwarted Central's attempt to compete with TCI *in* the Jefferson City market—Central made it clear it would not compete in the market and offered no damage theory for anything other than its being deprived of an *exclusive* license. Yet, even if the jury could find, as the district court believed it did, that TCI engaged in predatory conduct "with respect to competition in the market" (App. 55a), such conduct cannot render constitutional Central's otherwise unconstitutional property interest in being the City's sole cable

publisher. Again, the issue is not what TCI did, but whether Central ever made a claim for a constitutionally cognizable interest.

Central also argues that the Court should avoid resolving this First Amendment issue in a case between private litigants without participation of the municipality, even though the Eighth Circuit clearly reached the issue. (Opp. at 9) The court of appeals adopted TCI's statement of the First Amendment issues presented by the case, devoted several pages to a review of those issues, noted that its decision posed "profound first amendment implications" for cable operators, and specifically held that Central did have a protectable interest in being Jefferson City's sole cable speaker because it proved "that the 'natural monopoly' characteristics of the Jefferson City cable market justified the City in offering a de facto exclusive franchise. . . ." (App. 4a-11a) The record was fully developed as to the RFP process and the City's concerns with granting multiple licenses to cable operators. Numerous City officials testified at trial and the licensing process was examined in great detail. Central points to nothing lacking in the presentation of evidence that a municipal defendant would have provided.

Central nonetheless urges the Court to overlook those pressing First Amendment issues, to ignore the conflict among the circuits, and to wait for what Central terms a more "suitable" case. (Opp. at 9) Every opponent of a petition surely hopes that the Court will wait for another day, another case. TCI respectfully submits, however, that the First Amendment issues presented by the Petition will *not* wait for another day—without serious damage to TCI and free speech in the interim.[3]

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[3] In the Petition, TCI cited a number of pending cases that involve the issue of cable speakers' First Amendment rights. (Petition at 13 n.18) Central points to those pending cases to suggest that "there will be no shortage of suitable cases" in which the Court can resolve that issue—an issue that Central concedes "may well merit consideration by this Court in an appropriate case". (Opp. at 9, 5) Those "suitable", "appropriate" cases, however, may take years to reach the Court, and indeed may never be fully litigated if dangerous precedents such as the Eighth Circuit's decision are allowed to stand.

II. THE COURT OF APPEALS FAILED TO REVIEW THE RECORD IN LIGHT OF *BOSE*.

Despite its recognition of the First Amendment rights at stake, the Eighth Circuit failed to review the record independently, as this Court directed in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-11 (1984). That failure not only served to further the curtailment of TCI's First Amendment rights, but also placed the Eighth Circuit in conflict with other courts of appeals that have interpreted *Bose* more broadly. (Petition at 20-22)

Central argues that the Eighth Circuit, by stating that the record contained "substantial support" for the jury's implied finding on the natural monopoly issue, and by citing to one exhibit and to testimony summarizing that exhibit, sufficiently discharged its duty under *Bose*. (Opp. at 10; *see also* App. 10a)[4] As to the contrary evidence in the record, Central's "short answer" is that "the jury chose not to believe" TCI's evidence. (Opp. at 10)

The mandate of *Bose*, however, cannot be satisfied so mechanically. Appellate courts under *Bose* are to review the *whole* record, and to exercise "independent judgment" whenever First Amendment rights are threatened. 466 U.S. at 499, 511, 514.

Nor can Central invoke the jury verdict on this issue: were that the "short answer", there would never be a need for the independent review called for by *Bose*, in that the finder of fact may always be assumed to have "chosen not to believe" evidence that conflicts with its decision. *Bose* requires courts to look beyond the fact finder, to the actual evidence in the record.

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[4] In support of this view, Central adds that "the Court of Appeals went so far as to listen to the tapes of the closing arguments of counsel at trial". (Opp. at 10 n.9) Those closing arguments, however, were of course not evidence. Moreover, the court of appeals needed to review that tape in order to rule on TCI's claim that the closing argument had been unfairly limited, not in connection with TCI's First Amendment argument on appeal.

In *Bose*, this Court specifically stated that the "rule of independent review" gives to appellate judges a "constitutional responsibility that cannot be delegated to the trier of fact," whether judge or jury. *Id.* at 501.

Significantly, the Eighth Circuit never mentions *Bose* in its opinion. Had the court addressed TCI's *Bose* argument and carried out an independent review of the record, why would the court have not so stated? That it did not say so is simply a further indication that the court of appeals failed to undertake the thorough review of the entire record required by *Bose*. Nothing in the opposition brief contradicts that conclusion.

III. THE DECISION BELOW UNDERCUTS THE *NOERR-PENNINGTON* DOCTRINE.

In the Petition, TCI acknowledged that it had done some things of which it could not be proud—as had Central and the City itself. TCI argued, however, that, with the exception of conduct by one of its employees, TCI's activities were protected by the *Noerr-Pennington* doctrine. That doctrine recognizes that even unsavory acts, such as deception of government officials, can constitute protected activity. (Petition at 22-29)

Central's response is, in reality, no response at all. Rather than confront TCI's *Noerr-Pennington* argument, Central concentrates chiefly on the conduct—threats by one employee—TCI has already conceded is not protected by the doctrine (although that conduct did not cause any injury to Central). (Opp. at 11-14)[5] TCI's showing, that the court below severely

[5] *See* Petition at 10 n.10, 29 n.41. Thus, Central's accusation that TCI believes that *Noerr-Pennington* protection extends to "death threats and similar conduct" (Opp. at 13) is simply false. Those threats constitute two of the six acts singled out at length by Central in its brief as outside *Noerr-Pennington* protection. (Opp. at 12-13) As to the remaining acts: the statements to senior citizens about shutting down TCI's system were held protected conduct by the Eighth Circuit. The alleged statements about competing technologies were not supported by the record, but certainly, if made, were misrepresentations which fell well within the range of conduct that *Noerr-Pennington* has been held to protect. Comments as to the consultant's qualifications

curtailed the doctrine, thereby impinging upon the right to petition and fostering a conflict among the circuits, is simply not addressed in any meaningful way.

Central does contend, however, that even if the bulk of TCI's activities are protected, the conceded unprotected conduct is sufficient to support the verdict. (Opp. at 13) As set forth below, that argument is circular and flouts prior rulings of this Court.[6]

IV. THE EIGHTH CIRCUIT IMPROPERLY PERMITTED THE JURY TO PILE INFERENCE UPON INFERENCE.

Central makes much of the "threats" that TCI concedes are not within the scope of *Noerr-Pennington* protection, going so far as to quote the alleged threats at length—twice. (Opp. at 2, 12) Central maintains that the jury could permissibly find that those threats—directed (as Central concedes) not at Central or the City Council but at an independent consultant hired by the City and another company, Teltran—caused harm to Central. (Opp. at 11, 13)

In order to make that causation finding here, the jury would be required to pyramid a number of inferences that are wholly without support in the record. (Petition at 29-30) This Court, however, has wisely limited the extent to which juries can draw inferences from circumstantial evidence. Those limits are necessary in order to prevent injustice, as recognized in this Court's precedents reaching back into the last century. (*Id.*) [7]

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were clearly protected opinion. Finally, TCI's withholding of the franchise fee as a set off in its lawsuit against the City also is clearly within *Noerr-Pennington*, and the Eighth Circuit itself had earlier held such "economic coercion" to be protected activity. *Mark Aero, Inc. v. Trans World Airlines, Inc.*, 580 F.2d 288, 296 (8th Cir. 1978).

[6] As noted in the Petition, TCI seeks review of the fourth question presented (involving limitations on inferences from inferences), only if the Court grants the writ as to the third question presented, involving the *Noerr-Pennington* doctrine.

[7] Central urges that this Court's decisions in *Manning v. Insurance Co.*, 100 U.S. 693 (1879), and *United States v. Ross*, 92 U.S. 281

Central argues that "[t]he jury verdict can be sustained without reference" to the threats, on the basis of TCI's "other . . . conduct" not protected by *Noerr-Pennington*. (Opp. at 14) Central's position is thus obviously circular: Central need not address TCI's *Noerr-Pennington* argument, says Central, because at least the threats are concededly outside of the doctrine; yet it also need not address the inferential evidence problem posed by the threats, because the jury could rely on other conduct that is also—despite TCI's unrebutted showing in the Petition—somehow outside the doctrine. Central's failure to address TCI's *Noerr-Pennington* argument indicates that there is no "other conduct" outside of the doctrine on which to base liability. Central's reliance on such an argument simply underscores the Eighth Circuit's misapplication of the *Noerr-Pennington* doctrine, and reinforces the fact that review by this Court is both necessary and timely.

CONCLUSION

The Petition clearly demonstrates that this case presents compelling issues of great significance to the nation and to the First Amendment values at the heart of the Constitution. Nothing in the Brief in Opposition has fairly called that conclusion into doubt.

(1875), only apply when legal presumptions are relied upon to find facts. (Opp. at 14) Central is incorrect: those decisions are not so narrow. A review of the opinions makes clear that both limit the use of *factual* inferences to infer facts. As this Court held in *Ross*, "[s]uch a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of *fact* or of law is reliable drawn from premises which are uncertain". 92 U.S. at 283-84 (emphasis supplied).

For the reasons set forth above, and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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